TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~530~~ 30

FLOYD LINN RATHBUN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 31, 1956
CERTIORARI GRANTED JANUARY 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 538

FLOYD LINN RATHBUN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 5, 1957

[fol. 1] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5314

FLOYD LINN RATHBUN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS RELIED UPON—Filed January 16, 1956

The appellant, Floyd Linn Rathbun, by his attorney Thomas K. Hudson, makes the following Statement of Points Relied Upon for reversal of the judgment and commitment against him entered by the *the* District Court of the United States, for the District of Colorado, on the 21st day of October, A.D. 1955, upon the verdict of the Jury finding said defendant guilty under Count I and guilty under Count II of the Indictment:

1. The Court erred in denying defendant's Motion to Dismiss Count I of the indictment for a fatal variance.
2. The Court erred in admitting the testimony of the witness Robert L. Maybers, to which objection was made.
3. The Court erred in admitting the testimony of the witness Herman R. Huskins, to which objection was made.
4. The Court erred in denying defendant's motion to strike the testimony of the witness Herman R. Huskins.
5. The Court erred in refusing to admit into evidence defendant's tendered Exhibit A.
6. The Court in refusing to admit into evidence defendant's tendered Exhibit B.
7. The Court erred in refusing to allow the defendant to offer rebuttal.

[fol. 2] 8. The Court erred in admitting into evidence the Government's Exhibit 2.

9. The Court erred in charging the jury and in refusing to charge the jury as requested.

10. The Court erred in failing to give witnesses excluded from the court room a cautionary instruction, although requested by the defendant.

Dated this 14th day of January, A.D. 1956.

Thomas K. Hudson.

[fol. 3] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Pleas and Proceedings before The Honorable William Lee Knous, Chief Judge, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE UNITED STATES OF AMERICA, Plaintiff,

v.

FLOYD LINN RATHBUN, Defendant.

No. 14,467, Criminal.

INDICTMENT. KNOWINGLY TRANSMITTING IN INTERSTATE COMMERCE A COMMUNICATION CONTAINING A THREAT TO INJURE. 18 USC 875 (b) (c).—Filed April 7, 1955

The Grand Jury charges:

That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, knowingly, wilfully and with intent to extort from Everett Henry Sparks, a thing of value, to-wit: 100,000 shares of stock of Western Oil Fields, Inc., did transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (b).

Count Two

The Grand Jury further charges:

That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, did knowingly and wilfully transmit in interstate commerce [fol. 4] from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (c).

A True Bill.

Earl C. Bartow, Foreman.

Donald E. Kelley, United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

ARRAIGNMENT AND PLEA—Entered April 15, 1955

On April 15, 1955, the United States of America appeared by James W. Heyer, Assistant United States Attorney, and the defendant Floyd Linn Rathbun appeared in person and by his counsel, Thomas K. Hudson, before the Honorable Jean S. Breitenstein, United States District Judge for the District of Colorado, and waived the reading of the Indictment and entered a plea of not guilty to counts 1 and 2 thereof; and it was Ordered that the defendant have twenty days in which to file Motions.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

VERDICT IN COUNT ONE—Filed September 14, 1955

We, the jury in the above entitled case, upon our oath do say, we find the defendant Floyd Linn Rathbun guilty as charged in count one of the indictment herein.

Floyd R. Murphy, Foreman.

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

VERDICT IN COUNT TWO—Filed September 14, 1955

We, the jury in the above entitled case, upon our oath do say, we find the defendant Floyd Linn Rathbun guilty as charged in count two of the indictment.

Floyd R. Murphy, Foreman.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JUDGMENT AND COMMITMENT—Entered October 21, 1955

On this 21st day of October, 1955 came the attorney for the government and the defendant appeared in person and by Thomas K. Hudson, his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts #1 and #2, and a verdict of guilty as to Counts #1 and #2 of the offense of Knowingly transmitting in interstate commerce a communication containing a threat to injure, in violation of Title 18 U.S.C. Section 875 (b) (c) as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day upon each of Counts One and Two of the Indictment herein, from and after this 21st day of October, A.D. 1955.

It is further Adjudged by the Court that the terms of imprisonment imposed in each of Counts One and Two of the Indictment herein shall run concurrently.

It is further Adjudged by the Court that the defendant shall pay to the United States of America a fine of One

thousand dollars ($1,000.00) upon Count One of the Indict-
[fol. 6] ment herein, and that the defendant shall stand committed to a common jail until payment of said fine, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous, United States District Judge.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION FOR NEW TRIAL—Filed September 21, 1955

The defendant moves the Court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion to dismiss Count I of the indictment for a fatal variance.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting testimony of the witness Captain Maybers of the Pueblo Police Department to which objections were made.
5. The court erred in admitting testimony of the witness Sergeant Huskins of the Pueblo Police Department to which objections were made.
6. The court erred in denying defendant's motion to strike the testimony of the witness Sergeant Huskins of the Pueblo Police Department.
7. The court erred in admitting the testimony of Special Agent Moore of the Federal Bureau of Investigation, to which objections were made.
[fol. 7] 8. The court erred in admitting the testimony of Special Agent McClulloch of the Federal Bureau of Investigation, to which objections were made.
9. The court erred in admitting into evidence the Government's Exhibit 2.
10. The court erred in refusing to admit into evidence defendant's tendered Exhibit A.

11. The court erred in refusing to admit into evidence defendant's tendered Exhibit B.

12. The court erred in refusing to allow the defendant to offer sur-rebuttal.

13. The court erred in charging the jury and in refusing to charge the jury as requested.

14. The court erred in failing to give witnesses excluded from the courtroom a cautionary instruction, although requested by the defendant.

Dated this 19th day of September, A.D. 1955.

Thomas K. Hudson, Alice Loveland, Attorneys for defendant.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

AMENDED NOTICE OF APPEAL—Filed October 27, 1955

Name and address of appellant: Floyd Linn Rathbun 607 San Mateo N.E. Albuquerque, New Mexico

Name and address of appellant's attorney: Thomas K. Hudson 613-616 Majestic Building Denver 2, Colorado

Offense: (Count One) That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, knowingly, wilfully and with intent to extort from Everett Henry Sparks, a thing of value, to-wit: [fol. 8] 100,000 shares of stock of Western Oil Fields, Inc., did transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun, did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (b); and (Count Two) That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, did knowingly and wilfully transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in

which telephonic communication the defendant, Floyd Linn Rathbun, did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (c).

Judgment on verdict finding defendant guilty on Count One and on Count Two; judgment entered September 14, A.D. 1955; Motion for New Trial denied October 4, A.D. 1955; sentence imposed on October 21, 1955, of imprisonment of one year and one day and a fine of one thousand dollars imposed.

Defendant is not now confined but is on bail.

I, the above-named appellant hereby appeal to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated this 24th day of October, A.D. 1955.

Thomas K. Hudson, Attorney for appellant.

[By order of November 17, 1955, the time for docketing the cause in the Court of Appeals was extended to January 10, 1956.]

[fol. 9] In United States District Court for the District of Colorado

Transcript of Trial Proceedings. (Excerpts).

Proceedings had before Honorable William Lee Knous, Judge of the United States District Court for the District of Colorado, and a jury, Courtroom A, Post Office Building, Denver, Colorado, on Monday, September 12, 1955, at 9:30 a.m.

Appearances:

James W. Heyer, Esq., Assistant United States Attorney, appearing for the Government. Thomas K. Hudson, Esq., Attorney at Law, 615 Majestic Building, Denver, Colorado; and Alice Loveland, Attorney at Law, 614 Majestic Building, Denver, Colorado; both appearing for the Defendant.

* * * * * * *

[fol. 10] EVERETT HENRY SPARKS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

* * * * * * *

[fol. 19] Q. What did you do after your last conversation with the defendant on the 16th?

A. I called the police of Pueblo and told them that I would like——

Q. You don't have to relate what you told them, sir, just the fact you did call them.

A. I did.

Q. Were you contacted by the officers of the Police Department?

A. Yes, sir.

Q. Do you remember when?

A. Well, I'd say that they arrived at my home shortly before 1:00 o'clock.

Q. And that would have been on the morning of March 17th?

A. Yes, sir.

Q. And did you have any conversation with this defendant while the officers were there?

A. Yes, sir.

Q. Who made that call?

A. Mr. Rathbun called me collect, sir.

Q. About what time?

A. I would say shortly after 1:00, maybe 1:10 or 1:05.

Q. And did you have a conversation with the defendant?

A. Yes, sir.

Q. Where were the officers while you were having a conversation with the defendant?

A. Well, I went to the phone, and told them they could just as well listen to the call. I'd been conversing prior to that.

Q. Was this call to your home, sir?

A. Yes, sir.

Q. How many phones have you there?

A. I have three phones, sir—two separate lines.

Q. And where was the phone that the officers listened on?
A. In the dining room, joining the living room.

* * * * * * *

[fol. 34] ROBERT L. MAYBERS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

Q. Will you state your name, sir?
A. Robert L. Maybers.
Q. And where do you live?
A. I live in Pueblo, 1344 East 34th Street.
Q. What is your occupation or business?
A. Police Officer, City of Pueblo.
Q. What is your rank?
A. Captain of Police.
Q. How long have you been with the Pueblo Police Department?
A. Since March, 1940.
Q. How long have you been Captain?
A. Since 1949.
Q. All right, sir. Were you on duty March 17 of 1955 in the early morning hours?
A. I was.
Q. Where were you performing your duties?
A. From the Captain's office in the Police Department, also cruising the city.
Q. Do you recall whether or not you had occasion to visit the residence of Mr. Sparks of Pueblo County?
A. I did.

OBJECTION TO ADMISSION OF TESTIMONY OF ROBERT L. MAYBERS

Mr. Hudson: If the Court please, at this time I desire to move that any testimony of Captain Nabor relative to the telephone conversation be excluded, and I should like to have an opportunity to argue the motion, your Honor.
[fol. 35] The Court: What's the basis? Under the Statutes or——

Mr. Hudson: Under Section 605.

The Court: Well, you may proceed with the examination up to that point, and I think at that time I'd like to hear counsel on it, and we will take it up in Chambers. But you can go ahead to that point.

Mr. Hudson: Thank you, your Honor.

Q. All right, sir. Did you answer the question, the last question?

A. I did.

Q. You did?

A. I had occasion to visit Mr. Sparks.

Q. What was the reason for your going to Mr. Sparks' residence?

A. I received a call from headquarters at 12:40 a.m. to contact Mr. Sparks by telephone concerning a problem that he had.

Q. Did you call him by telephone?

A. I did.

Q. Later did you go to his house?

A. I did.

Q. Were you alone or with someone else?

A. Sergeant Herman Huskins was with me at that time.

Q. Do you recall what time it was when you got there?

A. Not exactly, I imagine about 1:00 o'clock. It was 12:40 when we received the call. I called him, made another telephone call, then proceeded to his home from the central part of the city to his residence in the southwest part of the city.

Q. What did you do there?

A. I talked to Mr. Sparks in regards to the threat he had received.

Q. All right, and while you were there was there a telephone call that came through for Mr. Sparks?

Mr. Hudson: If the Court please——

The Court: Wait until he asks the question. The witness and Mr. Heyer both understand you are going to object to the question about the conversation. Up to now, nothing has been objectionable.

Q. How long after you had arrived at the Sparks' residence did the telephone call come through? A. About ten [fol. 36] minutes after we arrived.

Q. And what did you do when the phone rang?

A. When the phone rang, Officer Huskins and myself—Sergeant Huskins and myself—were placed on the extension in the dining room, I believe, of the residence, and we listened to the conversation.

Q. Did you know who was talking?

Mr. Hudson: Now, if the Court please, I object.

The Court: Re this conversation, I think this is a good place to stop right now, Mr. Heyer. Do you have any other witnesses that you wish to examine that have any bearing on it, involving this telephone conversation? Would you like to have that matter resolved now before we proceed?

Mr. Hudson: I'd like to have it resolved now.

* * * * * * *

[fol. 38] COURT'S OVERRULING OF OBJECTION

The Court: Well, I will rule that way. So the record here can show the objection will be overruled. I will announce to the jury that the objection is overruled.

Mr. Hudson: My exception will be noted.

The Court: Yes. Very well.

* * * * * * *

[fol. 39] HERMAN R. HUSKINS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

Q. State your name, sir.
A. My name is Herman R. Huskins.
Q. Where do you live?
A. Pueblo, Colorado.
Q. What is the street address?
A. 2021 North Santa Fe Avenue.
Q. Are you married?
A. I am married.
Q. Do you have a family?
A. I have.

Q. What is your occupation or business?
A. I am a police sergeant.
Q. And that's with the Pueblo Police Department?
A. That's with the Pueblo Police Department.
Q. How long have you been connected with the Pueblo Police Department?
A. Almost ten years.
Q. All right, sir. Were you on duty in March of 1955?
A. I was.
Q. Do you recall where you were in the early morning hours of March 17, 1955?
A. I do.
Q. Where were you?
A. I, with Captain Nabor, was in *in* my patrol car.
[fol. 40] Q. Were you on duty about midnight and shortly thereafter?
A. I was.
Q. Did you have any occasion to visit the residence of Mr. Sparks of Pueblo?
A. I did.
Q. Do you recall what time you went there?
A. We received the call to make a phone call—for the Captain to call a certain number—about 12:45 in the morning.
Q. All right, sir. And what time did you arrive at Mr. Sparks' residence?
A. It should have been maybe twenty minutes or maybe a little bit later than twenty minutes after he made the phone call.
Q. When you arrived, did you and the Captain talk with Mr. Sparks?
A. We did.
Q. While you were there, was there a telephone call made to Mr. Sparks?
A. There was.
Q. Did you know what party was on the other end of the line?
A. I don't think that I knew at that time.
Q. Did you hear any of that conversation?
A. I did hear it.
Q. What were the circumstances of your overhearing the conversation?

A. The way it was that I heard it, this man on the other end of the line answered to the name of Floyd. That's the only way I have of knowing who it was on the other end of the line.

Q. How did you happen to overhear anything?

A. The phone range and Mr. Sparks had told us that he had received two——

Q. You are not allowed to tell us what Mr. Sparks told you unless it was during the conversation.

A. That was during our conversation with him in the investigation of this call.

Q. Yes, sir, but it was not in the presence of this defendant. So, if you will, state whether or not you were on the extension phone.

A. Yes, I was on the extension phone.

Q. Could you overhear the conversation?

A. Yes, sir.

Q. And what was the conversation in as much detail as you can recall?

A. The man answering to the name of Floyd was asking Mr. Sparks to release some stock—oil stock—and Mr. Sparks explained to him that he couldn't do it without authority from the Western Oil Company—or whatever [fol. 41] that was. I don't remember right off. But he told him, on the advice of his attorney, he couldn't release it, and the man on the other end of the line used several vile names and some profanity and he said, "I am going to take a plane as I can, and I am going to finish this thing for once and for all." Mr. Sparks said on the other—this line—he said, "What do you mean? Like some of the threats you have made to me in the past?" The other party stated, "You're damned right." He says, "I am going to kill you, and I don't care if you're making a recording of this conversation."

Q. All right, sir. Is that about all the conversation you can recall?

A. That's all it amounted to there.

Q. Do you know whether or not shortly after that Mr. Sparks was given permission to carry a weapon, a pistol?

A. I don't know, but I do know that the Captain, Captain Nabor——

Mr. Hudson: If the Court please——

The Court: Wait a minute. I think— What's your objection?

Mr. Hudson: I object to the answer to the question. He has stated, "I don't know". He has no personal knowledge of whether the man did or did not receive a permit.

The Court: I think the objection is good. On the basis of the answer, if he doesn't know he can't tell what he heard.

Mr. Heyer: He was about to say, "I do know that the Captain—".

Mr. Hudson: We don't want to have what counsel thinks it is going to be.

The Court: No. It couldn't be conversation. I don't know what it is, Mr. Heyer, but if the witness doesn't have firsthand knowledge he couldn't testify, and he could not testify to any conversation.

Mr. Heyer: All right. You may examine.

OBJECTION TO ADMISSION OF TESTIMONY OF HERMAN R. HUSKINS AND OVERRULING THEREOF

Mr. Hudson: If the Court please, I did not interpose an [fol. 42] objection at the time Sergeant Huskins was called relative to this conversation. I assume that the record can show the same objection to this testimony that we show to Captain Maybers.

The Court: It can show on the basis of Section 605 that you object to the testimony of this witness concerning this telephone conversation, and we also show that the objection is overruled.

Mr. Hudson: Yes, sir, and show my exception to both of them.

* * * * * * *

[fol. 53] FLOYD RATHBUN, the defendant herein, called as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Hudson:

* * * * * * *

[fol. 62] Q. Did you make any statement to Mr. Sparks in that fourth conversation or in any of the previous conversations that you would kill him?

A. I did not.

Q. Did Mr. Sparks advise you that there was anyone listening in on the conversation?

A. No, sir.

* * * * * * *

[fol. 112] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 114] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 23, 1956 (omitted in printing).

[fol. 115] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5314—May Term, 1956

FLOYD LINN RATHBUN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Thomas K. Hudson for Appellant;

John S. Pfeiffer, Ass't. United States Attorney (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

[fol. 116] OPINION—August 23, 1956

Appellant was tried and convicted in the United States District Court for the District of Colorado on a two count indictment charging him with violations of Title 18 U.S.

C.A. §875(b) and 875(c). Count one charged that appellant knowingly transmitted an interstate communication containing a threat with the intent to extort a thing of value. Count two charged him with knowingly transmitting in interstate commerce a communication containing a threat to injure the person of Everett Henry Sparks. Rathbun has appealed from a conviction and sentence on both counts.

Eight assignments of error are urged for reversal. They are: (1) The court erred in denying defendant's motion to dismiss count one of the indictment for a fatal variance between the indictment and proof; (2) the court erred in refusing to admit into evidence defendant's tendered exhibits A and B; (3) the court erred in admitting into evidence the Government's exhibit 2; (4) the court erred in failing to give witnesses excluded from the courtroom a cautionary instruction; (5) the court erred in refusing to allow the defendant to offer certain rebuttal testimony; (6) the court erred in charging the jury and in refusing to give a requested instruction; (7) the court erred in denying defendant's motion to strike the testimony of witness Huskins; and (8) the court erred in admitting the [fol. 117] testimony of witnesses Maybers and Huskins. We have given careful consideration to each of these assignments of error. It is our conclusion that only assignments of error No. 1 and No. 8 present questions which need to be discussed in detail. We conclude that the remaining assignments of error did not substantially affect appellant's rights.

The indictment charged that the thing of value attempted to be extorted was 100,000 shares of the stock of Western Oil Fields, Inc., whereas the testimony referred to a stock certificate for 120,000 shares of stock in that company and made no reference to 100,000 shares. The law is well established that only substantial variance between allegations and proof affects a defendant's rights and that immaterial variations will be disregarded. All that is required is that the indictment be so framed that the accused is definitely informed of the charges against him and can prepare his defense and not be taken by surprise by the evidence offered at the trial.[1] The gist of the offense was that defendant

[1] Berger v. United States, 295 U.S. 78, 82; Mathews v. United States, 15 F.2d 139; Keys v. United States, 126 F.2d 181.

sought to extort stock of Western Oil Fields, Inc., by means of threats sent over telephone lines. The variance [fol. 118] between the 100,000 shares alleged and the 120,000 shares of which proof was offered is wholly immaterial and in no way tended to prejudice the defendant in the preparation of the defense.

A more difficult problem arises with respect to the admission of the testimony of Robert L. Maybers and Herman R. Huskins who at the invitation of Sparks listened in on an extension phone to a telephone conversation he had with Rathbun and were permitted to testify to threats they heard Rathbun make against Sparks in that phone conversation. Rathbun and Sparks had been partners. Bitterness developed between them. Sparks had in his possession 120,000 shares of stock of Western Oil Fields, Inc. The difficulty out of which the alleged threats arose was that Rathbun, who was in New York to obtain a loan, apparently needed this stock as security and Sparks refused to release it. They had several telephone conversations preceding the one in question. It was arranged that Rathbun would call Sparks at his home in Pueblo, Colorado, from New York at 1:00 a.m. in the morning. Sparks arranged with the Pueblo Police Department for Officers Maybers and Huskins to come to his home and listen in on an extension phone. As stated, they were permitted to testify over objection by defendant to what they heard Rathbun say in this conversation.

[fol. 119] 47 U.S.C.A. §605 in pertinent part provides, ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ." That is what is commonly known as the "Wire Tapping Statute." It is without dispute that one who intercepts a telephone conversation without the consent of the sender, while the conversation is being sent over the telephone wire, may not testify to such communication without the consent of the sender. So far there is no conflict in the decisions. The difficulty arises with what constitutes intereeption and who is a sender with respect to the question of consent.

Goldman v. United States, 316 U. S. 129, is one of the last cases in which this statute was considered by the

Supreme Court. While we do not think that it necessarily controls the disposition of the question presented to us because of a difference in the facts, it does lay down certain fundamental principles which are controlling. It makes it clear that only the sender of the message is protected and that his communication is immune from interception and subsequent publication based upon such interception only while it is being transmitted over the wire and before [fol. 120] it comes into the possession of the other party to the conversation. In the *Goldman* case the eavesdroppers had a delicate listening device attached to the wall of a room by means of which they could hear conversations between the parties in the room and also heard the words spoken by one of them into a telephone in a telephone conversation with a person at the other end of the line. What was specifically decided was that the words spoken into the telephone were heard the instant they were spoken and were therefore heard before they started their journey over the telephone line, and that there was therefore no interception of a message over the telephone line while in transit. We do not think it can seriously be contended that one who is in a room and hears words spoken into a telephone, or who is in an adjoining room and hears such words spoken even if by the aid of a mechanical device, is intercepting a message being sent over the wire.

There have been a goodly number of listening in on extension telephone cases before the lower courts and they are in sharp and irreconcilable conflict as to whether such listening without the consent of both parties constitutes a violation of the Act. Most of the courts have held that where officers with the consent of one of the parties have listened in on extension phones they may testify to what [fol. 121] they heard.[2] The Second Circuit, however, in two cases[3] has held to the contrary. No helpful purpose

---

[2] United States v. Bookie, 229 F.2d 130; United States v. White, 228 F.2d 832; Flanders v. United States, 222 F.2d 163; United States v. Pierce, 124 F.Supp. 264; United States v. Sullivan, 116 F.Supp. 480; United States v. Guller, 101 F.Supp. 176; United States v. Lewis, 87 F.Supp. 970.

[3] United States v. Polakoff, 112 F.2d 888; Reitmeister v. Reitmeister, 162 F.2d 691.

would be served by analyzing all of these cases which have spoken on this question. *Flanders* v. *United States*, 222 F. 2d 163, is a well reasoned case and clearly shows the line of cleavage.

We agree with Judge Hand that both parties to a phone conversation are alternately senders and receivers. That question, however, is not material here because the conversation in question was initiated by Rathbun and it must be held that he was the sender and that what he said could not be intercepted in transit and thereafter testified to by the one intercepting it without his consent. We do not mean to say that violation of the "Wire Tapping Act" may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the *Reitmeister* case, *supra*, the majority said: ". . . we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire made ad hoc." It may be possible as far as we know to attach an extension [fol. 122] phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception. The mechanics of attaching extension phones and the manner in which the extension phone in question was attached are not established by the record. In view of that, we must take as the facts of this case the statement of the court upon which it predicated its ruling. The court said: "They both heard it simultaneously but there wasn't an interception before it reached the ears of the intended receiver of the conversation and the witness. It may have been simultaneous but there wasn't an interception between the lips of one and the ears of the other." No objection was made to that statement of fact. Under those facts, we think the *Goldman* case controls and that the court was correct in concluding that Rathbun's conversation was not intercepted by these two police officers before it reached the ears of Sparks.

Affirmed.

MURRAH, concurring specially.

As I read the *Goldman* case, the question of interception becomes a study in mechanics; and that "overhearing" an [fol. 123] interstate telephone conversation by means of a conventional extension receiver at the terminus of the message, is not an interception within the meaning of the statute.

[fol. 124] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Before HONORABLE WALTER A. HUXMAN, HONORABLE ALFRED P. MURRAH and HONORABLE JOHN C. PICKETT, Circuit Judges.

JUDGMENT—August 23rd, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Floyd Linn Rathbun, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

By order of August 30, 1956, the time for appellant's petition for rehearing was extended to September 15, 1956.

[fol. 125] Petition for Rehearing covering 6 pages filed September 14, 1956 omitted from this print. It was denied, and nothing more by order, October 1, 1956.

[fol. 131] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING APPELLANT'S PETITION FOR REHEARING—October 1, 1956

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[By order of October 1, 1956, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28.]

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] SUPREME COURT OF THE UNITED STATES

No. 538, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to question 1 presented by the petition for the writ which reads as follows:

> "1. Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to-wit Sec. 605, Title 47, U.S. C.A."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 7

FLOYD LINN RATHBUN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

E. F. CONLY,
of Counsel for Petitioner,
771 Galena Street,
Aurora, Colorado.

THOMAS K. HUDSON,
American Founders Building,
1330 Leyden Street,
Denver, Colorado,
Attorney for Petitioner.

INDEX

TABLE OF CASES

INDEX—(Continued)

TEXTS

STATUTE

CONSTITUTION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

FLOYD LINN RATHBUN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Floyd Linn Rathbun, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 23rd day of August, A.D. 1956.

I. OPINION BELOW

The judgment of the District Court of the United States and the opinion of the Court of Appeals for the Tenth Circuit are printed in Appendix C, *infra*, p....

JURISDICTION

The judgment sought to be reviewed was entered by the United States District Court for the District of Colorado on October 21, 1955, affirmed by the United States Court of Appeals for the Tenth Circuit on August 23, 1956. A Petition for rehearing was denied by the Court of Appeals on October 1, 1956. A stay of mandate was entered by the Court of Appeals on October 1, 1956. Jurisdiction of this Court is invoked under Art. III, Sec. 2, Constitution of the United States.

QUESTIONS PRESENTED

This case involves the interpretation and application of a statute of the United States, to-wit: Sec. 605, Title 47, U.S.C.A., commonly referred to as the Communications Act; and also involves the right of an accused person to offer rebuttal at the time of trial.

The questions presented are:

(1) Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to-wit Sec. 605, Title 47, U.S.C.A.

(2) Does a person accused of crime have a right of rebuttal, when such right is requested.

STATUTES INVOLVED

Title 47, Sec. 605, U.S.C.A. provides that no person not being authorized by the sender shall intercept any communication and divulge or publish the contents of such communication.

The full text of this statute is quoted in Appendix A, *infra*, p. 9.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, by Article V of Amendments provides that no person shall be deprived of life, liberty or property, without due process of law.

The full text of this Article is quoted in Appendix B, *infra*, p. 9.

STATEMENT OF THE CASE

Summary

Rathbun, the petitioner, and Everett H. Sparks had engaged in numerous business transactions together. Rathbun caused to be issued in the name of Sparks a certificate for 120,000 shares of Western Oil Fields stock, which certificate was used as collateral for a $50,000.00 loan ob-

tained at a Denver Bank, the proceeds of the loan being delivered to Rathbun. The stock admittedly did not belong to Sparks, but was Rathbun's stock.

Rathbun went to New York to endeavor to obtain further finance and several conversations were had by long distance telephone between him and Sparks, and relating to the release of the certificate held as security. The last conversation between them was not a friendly one. Sparks, without Rathbun's knowledge, had two police officers of the Pueblo police force listening in on an extension telephone in another room of his dwelling to this conversation. These two officers were permitted to testify as to this conversation, the District Court holding that the same was not an interception and divulgence in violation of Sec. 605, Title 47, U.S.C.A.

At the trial of this matter, the prosecution offered certain witnesses in rebuttal. At the conclusion of the prosecution's rebuttal, request was made for permission to put on rebuttal evidence on behalf of the defendant, Rathbun, which request was refused by the District Court. We submit that this ruling constitutes a violation of the due process clause of the United States Constitution.

DETAILED STATEMENT

The essential facts above summarized may be spelled out in detail as follows:

Rathbun, petitioner, and Everett H. Sparks, had been well acquainted over a period of years and had done business together on a number of occasions, each had loaned the other money, and through various business transactions Rathbun became indebted to Sparks. Rathbun needing an additional $50,000.00 but was unable to obtain it from the bank on his own signature and the bank advised that it would loan the money upon the signature of Sparks. In order to secure Sparks in the matter, a certificate of Western Oil Fields, Inc. for 120,000 shares was issued in the name of Sparks and deposited with the loaning bank as security for the loan, at which time Western Oil Fields stock was selling for between $6.00 and $7.00 per share. The loan was made to Sparks in the amount of $50,000 and he in turn

delivered the money to Rathbun. There is no dispute in the testimony that the stock certificate did not belong to Sparks but was only issued in his name to be used as collateral.

Differences arose between the two men and Rathbun went to New York City to endeavor to obtain sufficient finance to pay off the loan to Sparks and obtain the release of the Western Oil Fields stock certificate, an arrangement to which Sparks had agreed prior to Rathbun's making the trip to New York.

On March 16, 1955, and extending into the early morning of March 17, 1955, several telephone conversations were had between Rathbun in New York and Sparks in Pueblo. In the last telephone call, which was made in the early morning hours of March 17, 1955, the conversation between Sparks and Rathbun was not a friendly one. The call was placed by Rathbun in New York to Sparks in Pueblo, and prior to accepting this call, Sparks called the police department in Pueblo, and two officers of the Pueblo Police Department, Sergeant Huskins and Captain Maybers, came to the Sparks home. Sparks requested these two officers to listen in on an extension line in another room to the conversation between him and Rathbun. One of the officers, Sergeant Huskins, testified that Rathbun stated to Sparks in that conversation, that he (Rathbun) was going to return to Denver and Kill Sparks. Maybers testified only that Rathbun said he was going to return and finish the matter for good. Objections were made to the testimony of these officers as being inadmissible under the provision of Sec. 605, Title 47, U.S.C.A. The objection was overruled by the District Court and the testimony admitted.

Rathbun admits that the telephone calls were made, but denied that he at any time threatened to kill Sparks.

Sparks had testified relative to a conversation between him and Rathbun which had occurred in November of 1954, and transaction between them, out of which the indictments arose. Mrs. Madelyn Rathbun, wife of Floyd Linn Rathbun, testified that during the meeting between the two men she was present and, no harsh words were uttered by either

Sparks or Rathbun, and no threat made by Rathbun to do injury to Sparks.

In rebuttal both Sparks himself and Bruce Johnson, a former employee of Sparks, took the stand to deny what transpired at that November 1954 Meeting; Johnson testifying that he had been present at the time of the meeting and that Rathbun had threatened to kill Sparks.

At the close of plaintiff's rebuttal, defendant Rathbun sought to put on rebuttal testimony for the purpose of impeaching the rebuttal testimony of the witness Johnson. The District Court refused to permit defendant to offer any rebuttal testimony.

By reason of such ruling the defendant was denied a right guaranteed to him by the Constitution of the United States, the right of due process.

The Court of Appeals upheld these rulings of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in effect a revocation of Section 605, Title 47, U.S.C.A.

The decision of the Circuit Court of Appeals, Tenth Circuit, with reference to the above cited federal statute is in conflict with the decisions of other Circuit Court of Appeals.

Goldman v. United States, 316 U.S. 129
United States v. Bookie, 229 F. 2nd, 130
Flanders v. United States, 222 F. 2d, 163
United States v. Polakoff, 112 F. 2d 888
Reitmeister v. Reitmeister, 162 F. 2d 691

There is involved here an important question of a federal statute, the construction and application of which has varied by the decision of each circuit court.

The effect of the ruling of the District Court and the decision of the Court of Appeals of the Tenth Circuit is to wholly nullify and abrogate Sec. 605, Title 47, U.S.C.A. It has placed upon the statute as written a limitation—a limitation not placed therein by the Legislature. The statute is broad, and provides that "****no person*, not being authorized

by the sender, shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person**." The Court of Appeals has by judicial decision inserted other words into that statute; it has by this decision said that the statute means "no person shall intercept by means of wire tapping, any communication." Had Congress intended to so limit the manner and mode of interception, it would have so defined and limited interception. This it did not do. Nor would an interpretation of Section 605 commend itself to reason whereby a communication intercepted by one method could be received in evidence, while a communication intercepted by another method would not be admissible. The broad and inclusive language of the section does not limit the interception to one means only, but a message is intercepted if the speaker thinks he is talking to one person, whereas in fact a third person is listening.

U. S. v. Gruber, 123 Fed. (2d) 307; *Billeci v. U. S.*, 184 F. (2d) 394.

The Constitution of the United States delegates to the Congress the power to make the laws of the land; The Court of Appeals by its decision in this case has abrogated and nullified the statute passed by the Congress. It has gone far afield. It has stepped from the judicial branch of the government into the legislative branch. This it cannot do.

The decision of the Court of Appeals brings forth a factual requirement which becomes so fine that it cannot be measured by any instrument known to man. Judicial notice will be taken of the fact that sound travels at approximately 1,100 feet per second. The decision holds that it becomes necessary to establish factually which ear heard the sound first, whether the receiver or the intercepter, and that is the same as saying if the lead from the point of interception was one inch longer than the lead to the receiver, there would be no interception. In other words, an Act of Congress by this decision is defeated and thwarted by an extra inch, or an extra foot, or an extra fraction of an inch of wire.

In order to completely implement this decision, it would be necessary to bring in chemical analysis of the wire

between the point of interception and the ear of the intercepter and the ear of the receiver. Unless the conductivity of the wire used in the two instances was exactly alike, one wire would conduct the sound faster than the other.

2. Does a person accused of crime have a right of rebuttal, when such right is requested.

The prosecution offered evidence on rebuttal of a transaction between Rathbun and Sparks, out of which the criminal indictment arose. Rathbun sought permission of the trial court to offer rebuttal, or surrebuttal as it is sometimes called, and the trial court denied that request. He was prevented from offering further evidence of that transaction, and he was prevented from impeaching the witnesses of the prosecution who testified on rebuttal. In a criminal case one of the elements of due process of law is an impartial trial, and an impartial trial was denied Rathbun. The scope of the Fifth Amendment is not confined by the notion of a trial court that a trial is consuming too much time, and therefore defendant is entitled to offer no rebuttal. The right created by the Constitution of the United States, the right guaranteeing that no person shall be deprived of liberty without due process of law should not be mutilated by the adoption of rules of procedure denying the accused an opportunity to offer rebuttal. The evil of such procedure can readily be seen. The prosecution may in rebuttal bring forth witnesses who deliberately falsify, witnesses who the defendant can prove are testifying falsely against him, yet he is denied the right and opportunity of impeachment by way of rebuttal. Such procedure is hardly calculated to insure a fair and impartial trial.

Wigmore on Evidence, Vol. VI, Third Edition, Sec. 1873-74

Humes v. U. S., 186 F. (2d) 875

CONCLUSION

The principles involved in this case are of broad application and interest. At issue here is nothing less than whether the laws enacted by Congress can be limited or abrogated by judicial decision, and whether the Constitution of the United States and the rights of every person there-

under are to be cast aside in favor of a procedural rule adopted by the Court, a procedural rule which defeats a substantive right.

We respectfully submit that certiorari should be granted and that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

E. F. Conly,
of Counsel for Petitioner,
771 Galena Street,
Aurora, Colorado

Dated October 12, 1956.

INDEX TO APPENDICES

APPENDIX A

Statute Involved

U. S. C. A., Title 47, Sec. 605, provides:

"**and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

APPENDIX B

United States Constitution, Amendments, Article V, provides:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself; *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation."

APPENDIX C

Judgment of District Court:

"On this 21st day of October, 1955 came the attorney for the government and the defendant appeared in person and by Thomas K. Hudson, his counsel,

It is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts No. 1 and No. 2, and a verdict of guilty as to Counts No. 1 and No. 2 of the offense of knowingly transmitting in interstate commerce a communication containing a threat to injure, in violation of Title 18 U.S.C. Section 875 (b) (c) as charged in the Indictment herein and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day upon each of Counts One and Two of the Indictment herein, from and after this 21st day of October, A.D. 1955.

It is further Adjudged by the Court that the terms of imprisonment imposed in each of Counts One and Two of the Indictment herein shall run concurrently.

It is further Adjudged by the Court that the defendant shall pay to the United States of America a fine of One

to kill the said Sparks, in violation of 18 U.S.C. 875 (c) (page 2).

A plea of not guilty was entered by the defendant, (page 3) a trial to jury was had and a verdict finding Rathbun guilty on both Counts One and Two of the indictment was returned by the jury (page 3).

On October 21, 1955, Rathbun received a sentence of one year and one day in prison upon each of the counts, such terms to run concurrently, and to pay a fine of $1,000.00 upon Count One of the indictment (page 4).

Motion for New Trial was denied (page 5) and an approved appearance bond was filed on October 21, 1955.

An appeal was taken to the Court of Appeals for the Tenth Circuit and on August 23, 1956, that Court affirmed the judgment of the District Court (page 15). The decision of the Court of Appeals is published in the Official Reporter System, 236 Fed. (2d) 514.

Petition for Rehearing was filed (page 20) and denied (page 21) on October 1, 1956.

A Stay of Mandate was also ordered on said date (page 21).

Petition for Writ of Certiorari was filed on October 31, 1956.

On January 14, 1957, certiorari was granted limited (page 21) to one question, to-wit:

> Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. and the admission into evidence of testimony of said third person relating to the contents of the conversation a divulgence of such intercepted communication and thus prohibited by the aforesaid statute?

The facts as revealed by the evidence and insofar as they are material to the question here presented are briefly as follows:

The complaining witness, Everett Henry Sparks, and the defendant, Floyd Linn Rathbun had been well acquainted with each other and closely associated with each other over a period of fifteen years (page 17) and their acquaintanceship and association had been both social and business. They had done considerable business together, had loaned each other substantial sums of money, had hunted and fished together. Certain stock of Western Oil Fields, Inc., was placed in the name of Sparks (page 17) but was not his stock and was used by him as collateral for a loan at the bank for the benefit of Rathbun. The proceeds of the loan in the amount of $50,000.00 were in turn delivered by Sparks to Rathbun, the stock being held as security (page 17).

On March 16, 1955, and extending into the early morning of March 17, 1955, several telephone conversations were had between Rathbun in New York and Sparks in Pueblo (page 8), in each of which Rathbun was importuning Sparks to release the stock held as collateral upon the payment of the loan (page 17).

At the request of Sparks, two officers of the Pueblo Police Department went to the Sparks' home (page 8-12) and at the request of Sparks, these two officers, Captain Maybers and Sergeant Huskins, listened in on an extension telephone in another room of the Sparks' home to the last conversation between Sparks and Rathbun. These two officers were called as witnesses by the prosecution to testify to the contents of said telephone conversation (pages 9-14).

Objection was made by counsel for the defendant Rathbun to the admission of such testimony upon the grounds that to permit them to testify to what they had heard by listening in on an extension phone without the

consent of Rathbun was a violation of Sec. 605, Title 47, U.S.C.A. (pages 9-10).

The objection was overruled and the officers permitted to testify as to the contents of that conversation as overheard by them (page 11).

Briefly, the substance of the testimony of the complaining witness, Sparks, was to the effect that commencing in the evening of March 16, 1955 and extending into the early morning hours of March 17, 1955, several conversations via long distance telephone were had between him and the defendant, Floyd Rathbun, Rathbun being in New York City and Sparks at his home in Pueblo, Colorado.

The last conversation between them took place at about 1:10 a. m. on March 17, 1955 when Rathbun called Sparks. Sparks, prior to accepting this call, called the Police Department of Pueblo and in response to that call two officers of the Pueblo Police Force, a Captain Robert S. Maybers and Sergeant Herman R. Huskins, had gone to the Sparks' home and were present when the last telephone call from Rathbun came through to Sparks in Pueblo. Sparks requested the officers to listen in on an extension telephone located in the dining room of the Sparks residence which room adjoined the living room where Sparks was receiving the conversation (pages 8-9). Rathbun was not told that the officers were listening in.

The testimony of both Captain Maybers and Sergeant Huskins was to the effect that they responded to the call to the police department made by Sparks and went to the Sparks home in Pueblo, that a telephone call was received by Sparks from Rathbun in New York at about 1:00 a. m. on March 17, 1955, and that Sparks requested the officers to listen in on the conversation, directing them to an extension telephone located in the dining room which adjoined the living room in the Sparks home.

The officers further testified that in this long distance telephone conversation Rathbun threatened the life of Sparks.

It is the admission of the testimony of these officers which defendant contends is in violation of Title 47, Sec. 605; that such listening in on an extension telephone constitutes an interception of the message and the divulgence of the contents of such conversation is prohibited by that statute.

There would seem to be no question but that the defendant, Rathbun, was the sender and that he gave no consent to the listening in by the officers.

Timely objection was made to the admission of their testimony.

V. ARGUMENT

The District Court held that such listening in on an extension telephone was not an interception within the meaning of the statute and permitted the officers to testify and to divulge the contents of the conversation which they overheard.

The Circuit Court of Appeals for the Tenth Circuit with reference to this particular point said: (page 19)

> "We agree with Judge Hand that both parties to a phone conversation are alternately senders and receivers. That question, however, is not material here because the conversation in question was initiated by Rathbun and it must be held that he was the sender and that what he said could not be intercepted in transit and thereafter testified to by the one intercepting it without his consent. We do not mean to say that violation of the "Wire Tapping Act" may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the Reitmeister case, *supra,* the majority said: ". . . we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire made *ad hoc.*" It may be possible as far as we know to attach an extension

(fol. 122) phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended."

The Circuit Court has founded upon an erroneous premise its finding and decision that the listening in on an extension telephone was not interception. It said: (page 19)

> "Whether such listening in constitutes a violation of the act would depend on where the extension phone was attached * * *"
>
> "The mechanics of attaching extension phones and the manner in which the extension phone in question was attached are not established by the record."

Where the extension telephone was attached and the method or manner of attaching extension telephones are immaterial. It can make no difference as to the time when a message being transmitted by telephone would be heard by the listener. Such hearing is a simultaneous hearing by all persons on the line. The words spoken are heard by the receiver and by any person listening in regardless of the position of the extension phone or the mechanical device used, and even by the sender, himself, simultaneously.

A brief explanation in non-technical language of the transmission of telephone conversations may be helpful here.

Most types of wave motion can be classified as either longitudinal waves or transverse waves.

A longitudinal wave is one in which small particles of the medium through which the wave travels vibrate in a direction parallel to the wave motion. This causes condensations and rarefactions of the medium. An example of a longitudinal wave is a sound wave traveling in air. The air particles in the wave path will be alternately condensed and rarefied, and any one particular section of the wave will move forward at approximately 1100 feet per second. The speed of sound depends partly on the air

temperature and pressure, 1100 feet per second being accepted as the value at sea level.

A transverse wave is one in which individual particles vibrate at right angles to the direction of the wave. This type of wave does not require a material medium in which to travel, for example, radio waves are transverse waves which can travel through free space, (or through a vacuum).

In a telephone conversation speech is transmitted by sound waves (longitudinal waves) from the speaker to the telephone transmitter, and from the telephone receiver to the listener's ear. However, from the transmitter at one end of the line to the receiver at the other, the speech is carried by electromagnetic waves. These are transverse waves, and in free space travel at the speed of light, approximately 186,000 miles per second.

A telephone call from New York City to Pueblo, Colorado, would travel by micro-wave radio to Denver and then by cable to Pueblo. The micro-wave transmission is at light speed or approximately 186,000 miles per second; the cable transmission is somewhat slower, (50,000 to 100,00 miles per second). Therefore, the total elapsed time for a sound to travel from New York to Pueblo (using the slower cable speed) would be 0.0128 seconds, or just slightly more than 1/100 of a second, or using the micro-wave transmission medium, which is at the speed of light, the transmission would be roughly 3 3/4 times faster, which would make the transmission approximately in 1/375th of a second, and such a space of time is impossible to measure.

Telephones connected 100 feet apart on a line would have a difference of only 0.0000003 second in the time of reception of a message. This is essentially a simultaneous reception and would be an interception of the message regardless of where the extension phone was connected.

Scott J. Marshall
Professor of Electrical Engineering and Electronics
Colorado School of Mines

New Elementary Physics by,
Robert Andrews Millikan and
Henry Gordon Gale

Telephone Theory and Practice
by Kempster B. Miller

The testimony in this case is that the one telephone was in the living room and the other telephone in the dining room which adjoined in a home located in Pueblo, Colorado. Telephone Companies are prone to get telephones as close together as possible and use the least amount of wiring. It is reasonable to assume that a normal size home of this case, the two phones would actually not be over 20 feet apart. If we may assume normal distances in the normal home, we would have to reduce the time element of .0000003 of a second by about eighty per cent. In other words, we are discussing time elements which are impossible of measurement and for all practical purposes are non-existent.

It is the province of the Congress of the United States to make our laws and it is the province of the Courts of the United States to interpret the laws with the final authority for such interpretation resting in the United States Supreme Court.

The word "intercept" as used in the statute is probably unfortunate, as the definition of the word "intercept" according to Webster's Dictionary is "to stop and seize in the way;" so that an item or article will never reach its intended destination. As an example, to intercept a forward pass in football, and the myriad other applications.

It is the duty of the Courts to make an application of the laws passed by Congress which is a reasonable application and which fairly portrays the intent of the Congress. It was not an item of physical interception which Congress

was attempting to prevent, but rather it was the invasion of the privacy of communication. What Congress was attempting to do was to prohibit the "listening in" or "eavesdropping" on private conversation and the statute was not intended to be controlled in its application by the measurement of a few feet of wire and an infinitesimal fraction of a second of time, and it would be totally unrealistic to so hold.

The thing which the decisions are attempting to establish is that private communication cannot be interfered with in any manner and that information obtained through any unauthorized interference in telephonic communication cannot be used for any purpose. The decisions are not uniform in how such interference occurs. Laws should be interpreted in the ordinary intent and purpose as expressed in their verbiage and an obtuse or impossible interpretation by the judiciary should not be read into an obvious statute.

The time element as shown herein is so negligible that it becomes simultaneous and every person connected in a telephone conversation hears the same words at the same time. For the courts to hold differently would be tantamount to repeal of the statute, — a right specifically granted to the Congress.

If the Court holds and finds other than as requested by the defendant in this case, it will be the same as giving to the unscrupulous a blue print as to the proper method of circumventing the intent of the statute. To allow the overheard conversation by the two police officers to be admitted as evidence in this case is the total destruction of the right of privacy of our telephone conversations. Such a decision would bring chaos into the business world as the imagination can conceive of innumerable situations where interception and over-hearing of our telephone conversations would be ruinous. It would lend itself to blackmail and even to a complete business stoppage. The conversations by telephone of the very members of this Honorable Court, the members of the Intelligence Department of our Govern-

ment, the Chiefs of our Army, our Navy and our Air Force, may be listened in to by an extension telephone and the content of those conversations revealed and divulged with immunity.

A decent respect for the policy of Congress must save us from imputing to the statute a self-defeating, if not disingenuous purpose. *Nardone v. United States*, 308 U. S. 338, 341; 60 S. Ct. 266, 268, 84 L.ed 307.

There is an old saying long used by the legal profession that "harsh cases make bad law." Some courts have held in cases cited herein that information obtained by an unauthorized interception either by a listening in by the human ear or by a mechanical device makes the information so obtained illegal to be used either as evidence or as the means to discover evidence. *United States vs Coplon*, 88 Fed. Supp. 921.

We earnestly urge that those courts which have by decision made a distinction between evidence obtained thru the use of a mechanical device and evidence obtained thru the unauthorized listening in or eavesdropping on an extension telephone are making a distinction without a difference. It is the divulgence of the content of the telephonic communiaction which is prohibited.

A telephone conversation may be intercepted as well by an extension telephone in another room as by the method commonly known as wire-tapping. There is no difference except in the name.

Construing the statute and its applicability to the admission of evidence procured contrary to its provisions is: *United States v. Polakoff*, 112 Fed. (2d) 888

> "Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by Sec. 605 to hold that because one party originated the call he had power to surrender the other's privilege. There cannot be the least doubt of

this as to the answers of the party called up; and while it might indeed be pedantically argued that each party had the power to consent to the interception of at least so much as he said, that would be extremely unreal, for in the interchange each answer may, and often does, imply by reference some part of that to which it responds. It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk. In the case at bar Kafton's consent was therefore not enough.

"Moreover, the recording was an 'interception.' It is true that in the three decisions in which the Supreme Court has interpreted Sec. 605, Title 47, U. S. Code, 47 U. S. C. A. Sec. 605, the prosecuting agents had physically interposed some mechanism in the circuit as it had been constructed for normal use; at least this is what we understand by a 'tap.' That was not the case here; the recording machine was merely fixed to an existing extension of the familiar kind in an adjoining room. We assume that the situation would have been no different had the agent merely listened at the extension and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts. * * * Violation of the privilege, we are admonished, is so grave a dereliction as to be 'destructive of personal liberty' (Nardone v. United States, 302 U. S. 379, 383; 58 S. Ct. 275, 277; 82 L. Ed. 314) and if it is not to be sham and illusion, it must protect its possesor at least against such intrusions.

"'A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not

disingenuous purpose.' Nardone v. United States, 308 U. S. 338, 341; 60 S. Ct. 266, 268; 84 L. Ed. 307. United States v. Yee Ping Jong, DC, 26 F. Supp. 69, is to the contrary, but does not persuade us."

Reitmeister v. Reitmeister, et al, 162 F. (2d) 691:

"Syllabus 4: Where defendant had a telephone extension in his own separate office leading from main wire, and to receiver at extension defendant attached recording machine and recorded conversations between plaintiff and defendant's employees, defendant in recording the conversations 'intercepted' messages within prohibition of Communications Act.

At *page 694*:

"In the case at bar, Louis recorded the talks which passed along the transmitting wire by means of an instrument, interjected in that wire; and we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire, made *ad hoc*."

A message is intercepted and divulged within the prohibition of the Communications Act whenever anyone causes the message to be transmitted to a third person without the consent of the sender. *U. S. v. Gruber,* 123 F. (2d) 307.

If the speaker thinks he is talking to one person, whereas in fact a third person is listening, there has been an interception of the message within the meaning of the statute. *Billeci v. U. S.,* 184 F. (2d) 394.

In the case at bar Rathbun thought he was talking to Sparks; whereas, in truth and in fact, police officers were listening on an extension telephone.

But, the decisions of the Circuit Courts are by no means uniform in their interpretation of the meaning of the word "interception." The Court of Appeals, Seventh Circuit, in *United States v. Bookie,* 229 Fed. (2d) 130, and *United States v. White,* 228 F. (2d) 832, are at variance with the decisions hereinbefore cited.

The decision of the Court of Appeals, Tenth Circuit, in the instant case brings forth a factual requirement which becomes so fine that it cannot be measured by an instrument known to man. The decision contains the following language:

> "We do not mean to say that violation of the 'Wire Tapping Act' may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the Reitmeister case, *supra,* the majority said: '. . . we cannot see why an existing lead off the main circuit was different from a "tap" into the wire made *ad hoc.*' It may be possible as far as we know to attach an extension phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception. * * *"

As this Court has held in *Nardone v United States,* 302 U.S. 379, 383; 58 S. Ct. 275, 277; 82 L Ed. 314, the violation of the privilege is so grave a dereliction as to be destructive of personal liberty, and if it is not to be sham and illusion, it must protect its possessor at least against such intrusions.

The statute does not speak of physical interruptions of the circuit, or of wire taps. It speaks of interceptions. The method that one employs to accomplish an interception is of no importance, it is the breach of privacy which the statute protects. *Nardone v United States, supra.*

VI. CONCLUSION

It is most respectfully urged that Congress in adopting Section 605, Title 47, U.S.C.A. intended to secure to each of us the privacy of telephonic communications by making it unlawful to divulge the contents of any conversation in-

tercepted without consent. The statute was not an attempt to make interception by one means unlawful and to authorize interception by another means.

The instant case is a vehicle by which a final determination may be had clarifying the meaning of Section 605, and of determining that any type of interception, whether by listening in, or eavesdropping or mechanical device, is a violation of that Section and the divulgence of the content of any information so obtained unlawful.

It is respectfully submitted that the judgment of the lower court be reversed, and the defendant released.

Respectfully submitted,

THOMAS K. HUDSON,
Attorney for Floyd Linn Rathbun
American Founders Building
1330 Leyden Street
Denver, Colorado

E. F. CONLY,
of counsel
771 Galena Street
Aurora, Colorado

thousand dollars upon Count One of the Indictment herein, and that the defendant shall stand committed to a common jail until payment of said fine, or until he is otherwise discharged as provided by law.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant."

(2) Judgment of the Court of Appeals, Tenth Circuit:

"Appellant was tried and convicted in the United States District Court for the District of Colorado on a two count indictment charging him with violations of Title 18 U.S.C.A. Sec. 875 (b) and 875 (c). Count one charged that appellant knowingly transmitted an interstate communication containing a threat with the intent to extort a thing of value. Count two charged him with knowingly transmitting in interstate commerce a communication containing a threat to injure the person of Everett Henry Sparks. Rathbun has appealed from a conviction and sentence on both counts.

Eight assignments of error are urged for reversal. They are: (1) The court erred in denying defendant's motion to dismiss count one of the indictment for a fatal variance between the indictment and proof; (2) the court erred in refusing to admit into evidence defendant's tendered exhibits A and B; (3) the court erred in admitting into evidence the Government's Exhibit 2; (4) the court erred in failing to give witnesses excluded from the courtroom a cautionary instruction; (5) the court erred in refusing to allow the defendant to offer certain rebuttal testimony; (6) the court erred in charging the jury and in refusing to give a requested instruction; (7) the court erred in denying defendant's motion to strike the testimony of witness Huskins; and (8) the court erred in admitting the testimony of witnesses Maybers and Huskins. We have given careful consideration to each of these assignments of error. It is our conclusion that only assignments of error No. 1 and No. 8 present questions which need to be discussed in detail. We conclude that the remaining assignments of error did not substantially affect appellent's rights.

The indictment charged that the thing of value at-

tempted to be extorted was 100,000 shares of the stock of Western Oil Fields, Inc., whereas the testimony referred to a stock certificate for 120,000 shares of stock in that company and made no reference to 100,000 shares. The law is well established that only substantial variance between allegations and proof affects a defendant's rights and that immaterial variations will be disregarded. All that is required is that the indictment be so framed that the accused is definitely informed of the charges against him and can prepare his defense and not be taken by surprise by the evidence offered at the trial. The gist of the offense was that defendant sought to extort stock of Western Oil Fields, Inc., by means of threats sent over telephone lines. The variance between the 100,000 shares alleged and the 120,000 shares of which proof was offered is wholly immaterial and in no way tended to prejudice the defendant in the preparation of the defense.

A more difficult problem arises with respect to the admission of the testimony of Robert L. Maybers and Herman R. Huskins who at the invitation of Sparks listened in on an extension phone to a telephone conversation he had with Rathbun and were permitted to testify to threats they heard Rathbun make against Sparks in that phone conversation. Rathbun and Sparks had been partners. Bitterness developed between them. Sparks had in his possession 120,000 shares of stock of Western Oil Fields, Inc. The difficulty out of which the alleged threats arose was that Rathbun, who was in New York to obtain a loan apparently needed this stock as security and Sparks refused to release it. They had several telephone conversations preceding the one in question. It was arranged that Rathbun would call Sparks at his home in Pueblo, Colorado, from Ne York at 1:00 a.m. in the morning. Sparks arranged with the Pueblo Police Department for Officers Maybers and Huskins to come to his home and listen in on an extension phone. As stated, they were permitted to testify over objection by defendant to what they heard Rathbun say in this conversation.

47 U.S.C.A. Sec. 605 in pertinent part provides, " . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the ex-

istence, contents, substances, purport, effect, or meaning of such intercepted communication to any person . . ." That is what is commonly known as the "Wire Tapping Statute." It is without dispute that one who intercepts a telephone conversation without the consent of the sender, while the conversation is being sent over the telephone wire, may not testify to such communication without the consent of the sender. So far there is no conflict in the decisions. The difficulty arises with what constitutes interception and who is a sender with respect to the question of consent.

Goldman v. United States, 316 U. S. 129, is one of the last cases in which this statute was considered by the Supreme Court. While we do not think that it necessarily controls the disposition of the question presented to us because of a difference in the facts, it does lay down certain fundamental principles which are controlling. It makes it clear that only the sender of the message is protected and that his communication is immune from interception and subsequent publication based upon such interception only while it is being transmitted over the wire and before it comes into the possession of the other party to the conversation. In the Goldman case the eavesdroppers had a delicate listening device attached to the wall of a room by means of which they could hear conversations between the parties in the room and also heard the words spoken by one of them into a telephone in a telephone conversation with a person at the other end of the line. What was specifically decided was that the words spoken into the telephone were heard the instant they were spoken and were therefore heard before they started their journey over the telephone line, and that there was therefore no interception of a message over the telephone line while in transit. We do not think it can seriously be contended that one who is in a room and hears words spoken into a telephone or who is in an adjoining room and hears such words spoken even if by the aid of a mechanical device, is intercepting a message being sent over the wire.

There have been a goodly number of listening in on extension telephone cases before the lower courts and they are in sharp and irreconcilable conflict as to whether such listening without the consent of both parties constitutes a

violation of the Act. Most of the courts have held that where officers with the consent of one of the parties have listened in on extension phones they may testify to what they heard.[2] The Second Circuit, however, in two cases[3] has held to the contrary. No helpful purpose would be served by analyzing all of these cases which have spoken on this question. *Flanders v. United States*, 222 F. 2d 163, is a well reasoned case and clearly shows the line of cleavage.

We agree with Judge Hand that both parties to a phone conversation are alternately senders and receivers. That question, however, is not material here because the conversation in question was initiated by Rathbun and it must be held that he was the sender and that what he said could not be intercepted in transit and thereafter testified to by the one intercepting it without his consent. We do not mean to say that violation of the "Wire Tapping Act" may not result from listening in on extension telephone. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the Reitmeister case, *supra*, the majority said: " . . . we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire made *ad hoc*." It may be possible as far as we know to attach an extension phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception. The mechanics of attaching extension phones and the manner in which the extension phone in question was attached are not established by the record. In view of that, we must take as the facts of this case the statement of the court upon which it predicated its ruling. The court said: "They both heard it simultaneously but there wasn't an interception before it reached the ears of the intended receiver of the conversa-

---

[2] United States v. Bookie, 229 F. 2d 130
United States v. White, 228 F. 2d 832
Flanders v. United States, 222 F. 2d 163
United States v. Pierce, 124 F. Supp. 264.
United States v. Sullivan, 116 F. Supp. 480
United States v. Guller, 101 F. Supp. 176
United States v. Lewis, 87 F. Supp. 970

[3] United States v. Polakoff, 112 F. 2d 888
Reitmeister v. Reitmeister, 162 F. 2d 691.

tion and the witnesses. It may have been simultaneous but there wasn't an interception between the lips of one and the ears of the other." No objection was made to that statement of fact. Under those facts, we think the Goldman case controls and that the court was incorrect in concluding that Rathbun's conversation was not intercepted by these two police officers before it reached the ears of Sparks.

AFFIRMED."

NO. [redacted]30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLOYD LINN RATHBUN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

THOMAS K. HUDSON,
American Founders Bldg.,
1330 Leyden Street,
Denver, Colorado.

E. F. CONLEY,
771 Galena Street,
Aurora, Colorado.

Attorneys for Petitioner.

INDEX

STATUTE CITED

CONSTITUTION

AUTHORITIES CITED

INDEX

OTHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 538

FLOYD LINN RATHBUN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

I. JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Tenth Circuit on August 23, 1956, and is reported in 236 Fed. (2d) 514, *Rathbun v. United States.*

Petition for Rehearing was denied by the Court of Appeals for the Tenth Circuit on October 1, 1956.

A Stay of Mandate was entered by said Court of Appeals for the Tenth Circuit on October 1, 1956.

Petition for Writ of Certiorari was filed on October 31, 1956.

On January 14, 1957, certiorari was granted by the United States Supreme Court.

This case involves the interpretation and application of a statute of the United States, to-wit: U.S.C.A. Title 47, Sec. 605. The decisions of the Circuit Courts of the United States which have construed and applied this statute are at wide variance and no semblance of uniformity has developed with relation to the interpretation and application of said statute.

The Constitution of the United States, Art. 3, Sec. 2, vests in the Supreme Court appellate jurisdiction in all cases arising under the Constitution and the laws of the United States.

II. STATUTE INVOLVED

U.S.C.A. Title 47, Sec. 605, 1928 Edition, page 161 of 1956 Supplement, the pertinent part of which provides as follows:

> "* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

III. QUESTION PRESENTED FOR REVIEW

Certiorari as granted by the Supreme Court was limited to the following question:

> Is the listening in by a third person on an extension telephone without the consent of the sender an interception within the meaning of Sec. 605, Title 47, U.S.C.A. and the admission into evidence of testimony of said third person relating to the contents of the conversation a divulgence of such intercepted communication and thus prohibited by the aforesaid statute?

IV. CONCISE STATEMENT OF THE CASE

On April 7, 1955, an indictment in two counts was returned against Floyd Linn Rathbun (page 2) charging that he knowingly transmitted in interstate commerce a communication containing a threat to injure, being a violation of 18 U.S.C. 875 (b) and (c).

Specifically, the First Count of the indictment charged that on or about March 17, 1955, at approximately 1:15 a. m., MST, Rathbun knowingly, wilfully and with intent to extort from Everett Henry Sparks a thing of value, to-wit, 100,000 shares of stock of Western Oil Fields, Inc. did transmit in interstate commerce from New York City, New York, to Pueblo, Colorado, a communication by telephone to the said Sparks, in which said telephonic communication Rathbun did threaten to injure the person of and to kill the said Sparks, in violation of 18 U.S.C. 875 (b) (page 2).

The Second Count of the indictment charged that on or about March 17, 1955, at approximately 1:15 a. m., MST, the defendant Rathbun did knowingly and wilfully transmit in interstate commerce from New York City to Pueblo, Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant Rathbun did threaten to injure the person of and

No. ~~[illegible]~~ 30

In the Supreme Court of the United States

OCTOBER TERM, 1956

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 538

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. C. 10–14, R. 4–11) is reported at 236 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 23, 1956 (R. 12) and a petition for rehearing (R. 15–17) was denied on October 1, 1956. The petition for a writ of certiorari was filed on October 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the listening-in on an extension telephone to a telephone conversation, with the consent of one of the parties to the conversation, constituted an interception of a communication prohibited by Section 605 of the Federal Communications Act.

2. Whether the court's denial of petitioner's request, after the government's rebuttal, to present further testimony about an incident constituted an abuse of discretion, where the witness had already testified about that incident.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (47 U. S. C. 605), provides as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the

existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the District of Colorado under a two-count indictment which charged him with knowingly transmitting in interstate commerce on March 17, 1955, a communication containing a threat to injure one Everett H. Sparks, in violation of 18 U. S. C. 875 (b) and (c) (Tr. 3–4, 5).[1] He was sentenced to concurrent terms of imprisonment of one year and one day on each count and a fine of $1,000

[1] The designation "Tr." refers to the transcript of the trial proceedings.

upon count 1 (Tr. 5–6). On appeal, the judgment of conviction was affirmed (R. 12).

The evidence adduced at the trial may be summarized as follows:

Complaining witness Sparks had been a close business and social acquaintance of petitioner for about 12 to 15 years (Tr. 10, 53). Sometime about April 1954 (Tr. 55), a stock certificate covering 120,000 shares of stock in Western Oil Fields, Inc., was issued in Mr. Sparks' name and deposited as collateral in a New York bank to cover a $50,000 loan which Mr. Sparks had obtained for petitioner (Tr. 11, 54–55). In November 1954 and March 1955, petitioner and Mr. Sparks met in Sparks' office to discuss the termination of their business relationship and the repayment of the $50,000 (Tr. 18, 56, see also Tr. 62). Mr. Sparks testified that, at the November meeting, petitioner told him that "I am going to take care of you, and you're going to be pushing up daisies. Your wife's going to be a widow and your kids are all going to be orphans. If you think more about money than you do them, why you'll have it that way" (Tr. 18). Petitioner denied that he made such statements at that meeting (Tr. 62).

During the day and morning of March 16–17, 1955, petitioner, who was in New York, had about four telephone calls with Mr. Sparks in Pueblo, Colorado, in an attempt to have Mr. Sparks release the Western Oil Fields, Inc., certificate of stock so that he could obtain funds (Tr. 10, 11, 56–57, 58). In the telephone conversations, petitioner requested Mr. Sparks to release the Western Oil Fields stock and he would at the same time repay the $50,000 loan. Mr. Sparks refused to comply with petitioner's request unless

Western was first notified but petitioner did not wish Western to be notified (Tr. 11–15, 19, 58–62). Mr. Sparks testified that in two of the conversations preceding the final conversation early in March 17, 1955, which is the subject of the indictment, petitioner said he would "have to take care of" him [Mr. Sparks] if he did not comply with his request, and referred to the threats which he made to Mr. Sparks in their November meeting (Tr. 14–15). The last telephone conversation, which took place about 1:00 a. m., March 17, 1955 (Colorado time), was initiated by petitioner. In anticipation of the call Mr. Sparks had called Officers Maybers and Huskins of the local police who listened to the conversation on an extension telephone in an adjoining room when the call came in (Tr. 19). Mr. Sparks testified that during this call petitioner threatened to come out on the first plane and kill him because he refused to comply with petitioner's request as to the stock certificate (Tr. 19–20, 29). Petitioner, although admitting that he used strong and vulgar language, denied that he made any threats of any kind to Mr. Sparks in this or any other conversation (Tr. 58–62).[2]

Over petitioner's objection that such evidence was inadmissible as being in violation of Section 605 of the Federal Communications Act, *supra*, pp. 2–3 (Tr. 36–37, 41–42), Officer Huskins testified that he heard petitioner threaten to kill Mr. Sparks, because Mr. Sparks would not release the Western stock certif-

[2] Petitioner returned to Colorado the following day and was arrested in Denver. A gun was found in his possession, but petitioner said that having been a deputy marshal until thirty days prior thereto he always carried a gun (Tr. 63–64).

icate. He testified that petitioner said: "I am going to kill you and I don't care if you're making a recording of this conversation" (Tr. 41).

The facts with respect to the refusal of the trial court to permit the petitioner to introduce evidence to refute the government's rebuttal are set forth in the Argument *infra*.

ARGUMENT

1. This case raises the question of whether a violation of Section 605 of the Federal Communications Act occurs when a third person listens to a telephone conversation on an extension, with the knowledge and consent of only one of the parties. Perhaps the court could have interpreted the words "I don't care if you're making a recording of this conversation" (Tr. 41) as a consent to an interception, but it did not do so. In basing its decision on whether the petitioner's words were heard by the officer listening on the extention before they reached the ears of the intended recipient, the court adopted a test which, though previously suggested, has not been generally used by the other courts passing on this issue.[3]

On the issue of whether such listening-in (or recording) with the consent of one of the participants to a telephone conversation is in violation of Section 605 of the Communications Act, there appears to be a

[3] When the third person overhears the message as it is received in the instrument being used by the intended receiver, it has been held that this is not interception since the wire communication has been completed. *Rayson* v. *United States*, C. A. 9, Oct. 29, 1956. That situation is comparable to overhearing the voice of the sender as he speaks into the transmitter. Cf. *Goldman* v. *United States*, 316 U. S. 129.

conflict between the circuits. The Sixth and Seventh have decided that there is no violation, as did the court below (*United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C. A. 6); *Pierce* v. *United States*, 224 F. 2d 281 (C. A. 6)). On the other hand, the Second Circuit reached a contrary result in *United States* v. *Polakoff*, 112 F. 2d 888,[4] and the Court of Appeals for the District of Columbia Circuit in *James* v. *United States*, 191 F. 2d 472, indicated approval of the *Polakoff* decision.[5] In view of this conflict, the government does not oppose the grant of the petition if limited to this issue.

2. Petitioner and his wife testified that the November 1954 meeting with Mr. Sparks in his office was friendly with no threats being made; and that Mr. Sparks' secretary, Mr. Johnson, left the Sparks' offices before the meeting occurred, and did not return until after the conversations had been concluded (Tr. 67, 80–81, 85–87). In rebuttal for the government, Mr. Johnson testified that he was present in the outer office while petitioner and his wife met with Mr. Sparks on November 1954 in the inner office which was separated from the outer office by a partition which did not reach the ceiling, and that he heard petitioner threaten Mr. Sparks (Tr. 88–89). When the government completed its rebuttal, petitioner's

[4] In *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C. A. 2), Judge Learned Hand expressed the view that *Goldman* v. *United States*, 316 U. S. 129, was not inconsistent with *Polakoff*, while Judge Chase stated that *Goldman* superseded *Polakoff*. In any event, the decision in *Reitmeister* was based on consent to the interception, so that no ruling on the basic question was involved.

[5] The question is again before the Court of Appeals for the District of Columbia Circuit in *Finnegan* v. *Daly*, No. 13,526.

counsel asked leave to call petitioner in surrebuttal with relation to this meeting. The court pointed out that petitioner had already testified about the meeting and denied the request (Tr. 96–97).

Petitioner now contends (Pet. 7; Br. 10–11) that this action by the court constituted a denial of his right to impeach the credibility of the government's rebuttal witness. The record refutes this contention. Since the rebuttal evidence was not new and since petitioner did not claim then that his surrebuttal was for the purpose of impeachment, additional testimony at this point, particularly on an issue not directly involved, would have been merely cumulative. As such, it was clearly within the court's discretion to deny the request. *F. W. Woolworth Co.* v. *Contemporary Arts,* 193 F. 2d 162, 166–167 (C. A. 1), affirmed, 344 U. S. 228.

CONCLUSION

The government does not oppose the grant of a writ of certiorari, but respectfully submits that it should be limited to the first question presented.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

DECEMBER 1956.

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1957

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

JOHN F. DAVIS,
Assistant to the Solicitor General,

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases:

Miscellaneous—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 30

FLOYD LINN RATHBUN, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 15-20) is reported at 236 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 23, 1956 (R. 20), and a petition for rehearing was denied on October 1, 1956 (R. 21). The petition for a writ of certiorari was filed on October 31, 1956, and granted on January 14, 1957 (R. 21-22, 352 U.S. 965). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

As limited in the order granting the writ of certiorari (R. 21, 352 U.S. 965), the question is:

Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to wit Sec. 605, Title 47; U.S.C.A.[1]

There is now pending before this Court on petition for a writ of certiorari to the Second Circuit the question of whether evidence obtained in violation of 47 U.S.C. 605 by state officers enforcing state law, without the participation of federal officers, must be excluded by a federal court. *Benanti* v. *United States*, No. 231, this Term. In the event it should be held here that the evidence was illegally obtained under 47 U.S.C. 605, the conviction of the petitioner should still not be reversed if the ruling of the Second Circuit is followed. Therefore, we include a discussion of this issue at pages 26 to 31, *infra*.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1064, 1103 (47 U.S.C. 605), provides as follows:

---

[1] The phraseology of this question is taken directly from the petition. In using the word "sender" the petitioner makes the assumption that the initiator of a two-way telephone conversation is a "sender" within the meaning of the Communications Act. We shall discuss the validity of this assumption below.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the

benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the District of Colorado under a two-count indictment which charged him with knowingly transmitting in interstate commerce on March 17, 1955, a communication containing a threat of personal injury in aid of an attempted extortion, in violation of 18 U.S.C. 875(b) and (c) (R. 2-4). He was sentenced to concurrent terms of imprisonment of one year and one day on each count and a fine of $1,000 upon count 1 (R. 4-5). On appeal, the judgment of conviction was affirmed (R. 20).

The circumstances under which the communications were made, although not reprinted in the record, are not in dispute (Pet. Br. 5-7). The complaining witness, Mr. Sparks, had been a close business and social acquaintance of petitioner for about 12 to 15 years. Sometime about April, 1954, a stock certificate covering 120,000 shares of stock in Western Oil Fields, Inc., was issued in Mr. Sparks' name and deposited as collateral to cover a $50,000 loan which Mr. Sparks had obtained for petitioner. During the day and morning of March 16-17, 1955, petitioner, who was in New York, had about four tele-

phone conversations with Mr. Sparks in Pueblo, Colorado, in an attempt to have Mr. Sparks release the Western Oil Fields, Inc., certificate of stock so that he could obtain funds. Mr. Sparks refused to comply with petitioner's request unless he first obtained a release from Western, but petitioner did not wish Western to be notified.

The last telephone conversation, which took place about 1:00 a.m., March 17, 1955 (Colorado time), was initiated by petitioner (R. 8). In anticipation of the call Mr. Sparks had called Officers Maybers and Huskins of the local police and told them of the prior threats (R. 10). At his request they listened to the conversation on an extension telephone in an adjoining room when the call came in (R. 10-13). Over petitioner's objection that such evidence was inadmissible as being in violation of Section 605 of the Federal Communications Act, *supra*, pp. 3-4 (R. 9-11). Officer Huskins testified that he heard petitioner threaten to kill Mr. Sparks, because Mr. Sparks would not release the Western stock certificate. He testified that petitioner said: "I am going to kill you, and I don't care if you're making a recording of this conversation" (R. 13). Petitioner, although admitting that he used strong and vulgar language, denied that he made any threats of any kind to Mr. Sparks in this or any other conversation.[2]

---

[2] Petitioner returned to Colorado the following day and was arrested in Denver. A gun was found in his possession, but petitioner said that, having been a deputy marshal until thirty days prior thereto, he always carried a gun.

SUMMARY OF ARGUMENT

In this case a witness testified to a telephone conversation which he heard on a regularly installed telephone instrument with the knowledge and consent of one of the parties to the conversation. The major issue is whether this was an "interception" forbidden by 47 U.S.C. 605.

I

47 U.S.C. 605 forbids the interception and divulgence of telephone conversations, *Nardone* v. *United States*, 302 U.S. 379, but it does not prevent the parties to a telephone conversation from disclosing what was said. Telephone conversations are not privileged communications and are protected only while they are passing through the telephone lines, and before they arrive at the "destined place". *Goldman* v. *United States*, 316 U.S. 129, 134; *Nardone* v. *United States*, 308 U.S. 338. The legislative history of Section 605 shows that Congress intended to forbid only the surreptitious interjection into the circuit of an independent device for overhearing or recording the conversation—a practice which had been held not unconstitutional in *Olmstead* v. *United States*, 277 U.S. 438.

The word "intercept" as used in Section 605 has been defined by this Court as indicating the taking or seizure by the way or before arrival at the destined place. *Goldman* v. *United States*, *supra*. As applied there, this Court held that no interception occurred when a listening device was used to listen surreptitiously to the talker's voice itself as he made

a telephone call, rather than to the electric transmission of his voice. When applied to the recipient of a telephone call, it follows that no interception occurs when a third party is permitted to share the handset with the recipient and thus hear both parts of the conversation. The statute does not forbid eavesdropping, it forbids tampering with the communication system. Lower courts have so held.

The same considerations apply when a regularly installed second telephone is used, with the consent of one of the parties, to overhear the conversation. The term "destined place" referred to in *Goldman* must mean the telephone installation corresponding to the number called by the one who initiates the call. All telephone instruments there connected are part of that installation. All correspond to the number called. The message arrives simultaneously at each extension handset. There is no interjection of a tap. All telephone instruments are part of the "destined place" of the telephone communication. The recipient of the call, therefore, is free to authorize another to listen to the conversation on a second telephone, just as he may permit another to share his handset. A large majority of the lower courts regard the two cases as indistinguishable.

In most communications the speaker relinquishes control over what is said, written, or conveyed by telephone. He accepts the chance—except for certain privileged communications—that the recipient may use the message for his own ends, or may be an undercover police agent who will testify, or may carry a hidden transmitter. *On Lee* v. *United*

States, 343 U.S. 747. Both the Fourth Amendment and Section 605 protect the same kind of privacy. The statute merely puts the parties on the same footing as that found in a face-to-face conversation. There is no Fourth Amendment violation when one party in a face-to-face conversation is wired for sound, thus permitting a third party to listen in; there should be no statutory violation when one party to a telephone conversation permits a third party to listen on an extension. Similarly, in the case of a letter, its writer cannot complain if the addressee authorizes a third party to receive, open, and use the contents of the letter. The federal statute which protects the mails terminates with delivery at the destined place.

Extension telephones are in widespread use. It is a common—even necessary—business practice to have a secretary take notes on telephone calls through the use of a second telephone. Persons placing telephone calls are generally aware that their message may be received at one or more instruments corresponding to the number called, and that a record may be made of the contents of the call. To hold that every secretary who assists her employer in this fashion commits a federal offense would go far beyond the situation contemplated by Congress when it enacted Section 605. The overhearing of a conversation on a telephone extension does not interfere with the means by which the message is transmitted from the sender to the receiver; it is not a taking of the message before arrival at the destined place. It is, therefore, not a prohibited interception.

II

Moreover, regardless of whether an unauthorized use of an extension is held to be a violation of Section 605 of the Communications Act, the record here indicates that both parties to the conversation consented to its being overheard. The Act by its terms applies only to unauthorized interceptions. On the record it is clear that Mr. Sparks invited the police officers to listen and that the petitioner independently asserted, "I don't care if you're making a recording of this conversation." (R. 13.) Under these circumstances, petitioner has no basis now to complain about what was done.

III

Whether or not the listening on the extension was an illegal interception, evidence of what was heard was nevertheless admissible, because it was obtained by local officers enforcing local law without federal participation.

Petitioner had threatened Sparks in several telephone calls on March 16, 1955, prior to the call which was overheard. Sparks believed that petitioner was sincere and sought local police protection. The local police who listened were trying to assess the danger of violence—a matter within their competence. Federal officers did not participate in the listening, and there was no collusion between state and federal officers.

Evidence obtained by state officers in violation of the Fourth Amendment is admissible in federal pros-

ecutions when federal officers did not participate in the violative act and where the illegal action by state officers was taken in enforcement of state law. *Lustig* v. *United States*, 338 U.S. 74.

The kind of privacy protected by Section 605 is similar to the privacy protected by the Fourth Amendment. *Nardone* v. *United States*, *supra*, 308 U.S. 338, 340-341. If *Weeks* v. *United States*, 232 U.S. 383, does not require federal courts to exclude evidence unlawfully seized by state officers enforcing state law, *Lustig* v. *United States*, *supra*, then Section 605 and the *Nardone* rule should not be held to bar wiretap evidence obtained by state officers enforcing state law.

ARGUMENT

I

Evidence Obtained By Listening To A Telephone Conversation Through the Use of a Regularly Installed Connection With the Consent of One of the Parties To the Conversation Is Not Obtained In Violation of Section 605 of the Communications Act and May Be Admitted In Evidence.

This case raises the question of whether a violation of Section 605 of the Federal Communications Act occurs when one person testifies to a telephone conversation which he overheard on a regularly installed telephone connection, with the knowledge and consent of one of the parties to the conversation. The government's position is that such listening-in is not an interference with the means of communication and therefore not an inter-

ception prohibited by Section 605. The situation is essentially the same as where one party permits a third person to overhear the conversation as it is received in the handset used by the intended receiver. There is no interception of the message before its receipt at the place to which it is directed, the act forbidden by the statute. There is merely disclosure by the recipient of the message at the time of its receipt—a disclosure to which the statute does not relate, an act which it does not forbid.

A. ***Section 605 does not prevent one party to a telephone conversation from revealing its contents. It precludes interference with the system of communication by interception in the process of transmission.***

Section 605 of the Federal Communications Act of 1934, 47 U.S.C. 605, prohibits the interception and divulgence [3] of telephone communications, *Nardone* v. *United States*, 302 U.S. 379. It does not restrict disclosure by the parties of the substance or terms of the communication.[4] Either party, assuming there are two, may testify to its contents. Either one may set out in a memorandum what was said,

---

[3] There was divulgence in this case; the only question is whether there was interception. Therefore, we do not reach the question of whether there must be both interception and divulgence before 47 U.S.C. 605 is violated.

[4] In this brief, we are concerned only with direct communications between two parties, rather than messages sent over a telegraph or radio system where employees of the system do the actual transmitting and receiving. Section 605 does of course prohibit disclosures or improper use of information coming into the possession of employees by reason of their positions.

without the consent of the other. "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." *Goldman* v. *United States*, 316 U.S. 129, 133. No question of a privileged communication arises. *United States* v. *Pierce*, 124 F. Supp. 264, 269 (N.D. Ohio), affirmed, 224 F. 2d 281 (C.A. 6). As construed by this Court, Section 605 achieves its protective purpose by forbidding the interception of a telephone conversation while it is within a "realm of privacy" during its passage through the telephone lines. *Nardone* v. *United States*, 308 U.S. 338, 340; *Goldman* v. *United States*, *supra* 316 U.S. 129, 133-134. In this respect, the section merely puts the parties on the same footing as though they had spoken face-to-face. What they choose to do thereafter with the knowledge so gained is not the concern of the statute. The substance and terms of the communication are not privileged simply because the telephone system was used.

The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver.

The first legislative effort to safeguard private radio communications was contained in the Radio Act of 1912 (37 Stat. 302) which established federal control over interstate radio. The nineteenth section of that act was captioned "Secrecy of Messages"

and forbade, not interception, but "divulging or publishing" radio messages without authorization.[5]

The nineteenth section of the 1912 Act was replaced by Section 27 of the Radio Act of 1927 (c. 169, 44 Stat. 1164, 1172). Although the act dealt only with radio, a portion of Section 27 bore a clear relation to that part of Section 605 which is material here, for it said:

> * * * and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *.

In 1928, this Court decided *Olmstead* v. *United States*, 277 U.S. 438, holding that the rule of exclusion, as to evidence obtained in violation of the Fourth Amendment, did not apply to evidence obtained through the tapping of telephone wires, even though the law of the state involved prohibited such

---

[5] The text of the section read as follows:

"No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court."

practice. Thereafter, numerous bills were introduced to overcome the effect of the *Olmstead* decision,[6] but all of these efforts, save one,[7] failed until the passage of the Communications Act of 1934, 48 Stat. 1064, as amended, replacing the Radio Act of 1927, *supra*.

Section 605 of the Communications Act of 1934 (47 U.S.C. 605) prohibits the unauthorized interception and publication or use of communications, saying, in part:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge * * * [its contents] to any person; * * *.

The only explanation of this section was contained in House Report 1850, 73rd Congress, 2d Session (p. 9), where it was said:

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but is also made to apply to wire communications.

While this explanation is rather crytic, it was plain enough that Congress intended, by the use of the word "intercept", to forbid the procedure held not to be forbidden by the Fourth Amendment in *Olm-*

---

[6] H.R. 4139, H.R. 5416, 71st Cong., 1st Sess.; S. 6061, 71st Cong., 3d Sess.; see 71 Cong. Rec. 5968; H.R. 23, H.R. 5305, H.R. 9893, S. 1396, 72d Cong., 1st Sess.; see 75 Cong. Rec. 4541, 4733; 74 Cong. Rec. 3928.

[7] A provision of the Department of Justice Appropriation Act for the year ending June 30, 1934 (approved March 1, 1933) forbade the use of any part of the appropriation for "wire tapping" to procure evidence of violations of the National Prohibition Act, 47 Stat. 1379, 1381.

stead, supra—the interjection of an independent device in the telephone system used by the parties to a telephone conversation. *Nardone* v. *United States*, *supra*, 302 U.S. 379, 382; *Nardone* v. *United States*, *supra*, 308 U.S. 338; *Weiss* v. *United States*, 308 U.S. 321, 326.

The issue in this case, therefore, is whether listening on an extension telephone is an interception imposed upon the communication system or merely the overhearing of a message sent through a system which has not been tampered with.

B. *Listening on a regularly installed telephone instrument to a message which has been transmitted without interruption to the place to which it was directed is not an interception within the meaning of Section 605.*

In *Goldman* v. *United States*, 316 U.S. 129, 134, this Court defined the word "intercept" for the purposes of Section 605, saying:

> * * * this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.

As applied in that case, the definition meant there was no interception when a detectophone was used to listen surreptitiously to the defendant's conversation as he made a telephone call.

When *Goldman* is applied to the reception of a telephone call, it follows that no interception results if a third party is permitted to overhear the con-

versation at the handset used by the recipient. Under *Goldman*, no forbidden interception occurs when someone overhears the voice of the original *sender* as he speaks for there has been no taking of the communication while it was within the protected conduit. Equally, there is no interception if someone overhears the *reception* of the call. And if someone overhears both through the handset of the recipient, Section 605 is not violated. In such a case there has been no taking before arrival. The transmission has ended; the message has fully passed through the means of communication. *Rayson* v. *United States*, 238 F. 2d 160 (C.A. 9); *United States* v. *Bookie*, 229 F. 2d 130 (C.A. 7); *United States* v. *Lewis*, 87 F. Supp. 970 (D.D.C.), reversed on other grounds, 184 F. 2d 394 (C.A.D.C.); *United States* v. *Pierce*, 124 F. Supp. 264 (N.D. Ohio), affirmed *per curiam*, *Pierce* v. *United States*, 224 F. 2d 281 (C.A. 6). The statute does not forbid eavesdropping; it forbids tampering with the line of communication. No privilege attaches to the substance of the message; the privilege relates only to the means by which the message gets from the place from which it was sent to the place to which it was sent. Beyond that means, at either end, either party would be free to use an amplifier or acoustic-type recording device,* authorize a third person to do

---

* Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. The

so, or permit another to listen with him at his handset.

The considerations discussed above also apply when an extension telephone[9] is used, with the consent of one of the parties, to overhear the conversation. In *Goldman* v. *United States*, *supra*, 316 U.S. at p. 134,

---

attachment is usually made at the bell box of the telephone instrument and may be made only by the telephone company. A condition of such an installation is that an automatic tone warning device be used in connection with it. If the subscriber makes his own permanent connection and does not use the warning device he commits a breach of his contract with the telephone company and may be subject to the sanctions of 47 U.S.C. 401 and 411. However, there are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation, as mentioned above. The second is the inductive type which relies upon the use of an induction coil placed in proximity to the telephone line. The Commission regards its use as prohibited by the Commission's orders. The third is the acoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. See Report of the Commission In the Matter of Use of Recording Devices in Connection with Telephone Service, Adopted March 24, 1947, Docket No. 6787, 11 F.C.C. 1033, and orders dated November 26, 1947, and May 20, 1948, issued in connection therewith, 12 F.C.C. 1005, 1008.

[9] The use of the term "extension" may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used. Thus, the use of the word "extension" really means another regularly installed telephone instrument.

the word "intercept" was held to mean "* * * the taking or seizure by the way or before arrival at the destined place" (*supra*, p. 15). The term "destined place" must be understood to mean the telephone station called, including all of the instruments regularly installed there. When a person calls a certain telephone number, he is entitled to have his message travel unimpeded to the handsets corresponding to that number. But every attached instrument is equally a part of the installation for that number and multiple attachments are in common use. The person who answers may use any one of several instruments, and if physical proximity permits, he may use two or more. All correspond to the number called. All are part of the particular installation. The message arrives at all of the instruments simultaneously. All are part of the "destined place". Far from presenting the usual case of surreptitious wire tapping, there is no interjection of an independent device, no tampering with the line. The recipient of the call, therefore, is free to authorize another to listen to the conversation on another instrument, just as he may permit another to share his handset.

In any communication to another—whether by speech, written word, or electronic means—a person relinquishes control over what is expressed. In the case of a face-to-face conversation, he accepts the chance that the person addressed will use the thought or fact expressed for his own ends. The hearer may repeat it to his friends and thus render the communication public knowledge; he may be an undercover police agent who will later testify; he may have

secreted another person nearby to overhear what is said; he may carry a secret transmitter and thereby permit others to overhear the conversation. *On Lee* v. *United States*, 343 U.S. 747. Except for certain privileged relationships, there is no legal basis for complaint in these instances. There is no violation of the Fourth Amendment.

The protection accorded telephone conversations arises from statute and not from the Fourth Amendment, but the kind of privacy protected by the former is similar, by analogy, to that preserved by the latter. *Nardone* v. *United States*, *supra*, 308 U.S. at 340-341; *Goldstein* v. *United States*, 316 U. S. 114, 120-121; *Schwartz* v. *Texas*, 344 U.S. 199, 201. It is therefore reasonable to interpret Section 605 as providing a privacy corresponding to that involved in a face-to-face exchange. On this basis, there is no violation of the statute if the recipient of the telephone call tells another its substance, or attaches an amplifier or recorder to his handset, or permits another to listen at his handset, or on another instrument. If there is no violation of the Fourth Amendment when it turns out that one of the parties to a face-to-face conversation carried a hidden transmitter, *On Lee* v. *United States*, *supra*, there should be no violation of Section 605 when one party to a telephone communication permits another to listen on another instrument. True enough, there is something undisclosed to the communicant in both instances. The first sort of non-disclosure is permissible under the Constitution; the second is permissible under the statute.

An analogy may be drawn to the ban on interception of letters, which derives from the Fourth Amendment, *Ex parte Jackson*, 96 U.S. 727, and is implemented by statutes prohibiting obstruction of the mails. 18 U.S.C. 1702, 1708. The protection extends only while the letter is in the mails, and not before deposit or after delivery to the person to whom it is addressed. The addressee may testify to the letter's contents, or permit another to read it, or copy it, or authorize another to accept delivery of and open the letter. *Maxwell* v. *United States*, 235 F. 2d 930, 932 (C.A. 8), certiorari denied, 352 U.S. 943. The reach of the federal law terminates with that delivery. The author of the letter has no cause for complaint regarding the identity of the agent appointed to accept and open the letter. Similarly, the coverage of Section 605 terminates when the telephone message is delivered into the handset or handsets corresponding to the number called. There is no violation if the person called authorizes another to receive the message on a second instrument.

A ruling that the use of a telephone extension is not an interference with the system of telephone communication seems particularly appropriate in the light of the widespread use of extension telephones. Prudent business practice requires some sort of record of oral communications. The practical method of preserving the substance of transactions conducted over the telephone is by contemporaneous notes or recording. For this reason, many individuals, in business, government, and the professions, have their secretaries listen to telephone calls on a second in-

strument in order to record the message in shorthand. The practice is sufficiently widespread so that an individual placing a telephone call is generally aware that his message may be received by more than one handset and that a record may be made of it. To hold that every secretary who takes notes in this fashion violates a federal statute would stretch the statute far beyond the evil intended to be prohibited by Congress.

Most of the lower courts have regarded as indistinguishable the factual situation where the conversation is overheard at the same handset used by a party and the situation where a conversation is overheard on a second telephone. *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *Flanders* v. *United States*, 222 F. 2d 163 (C.A. 6); *United States* v. *Guller*, 101 F. Supp. 176 (E.D. Pa.); *United States* v. *Sullivan*, 116 F. Supp. 480 (D. D.C.); *United States* v. *Lewis*, *supra*, 87 F. Supp. 970 (D. D.C.), reversed on other grounds, 184 F. 2d 394 (C.A. D.C.); *United States* v. *Pierce*, *supra*, 124 F. Supp. 264 (N.D. Ohio), affirmed, 224 F. 2d 281 (C.A. 6); *United States* v. *Yee Ping Jong*, 26 F. Supp. 69 (W.D. Pa.); *contra*, *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2); *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2); *James* v. *United States*, 191 F. 2d 472 (C.A. D.C.). Some indeed have involved both situations. *United States* v. *Lewis*, *supra*, 87 F. Supp. 970 (D. D.C.), reversed on other grounds, 184 F. 2d 394 (C.A. D.C.); *United States* v. *Pierce*, *supra*, 124 F. Supp. 264 (N.D. Ohio), affirmed, *Pierce* v. *United States*, 224 F. 2d 281 (C.A. 6). The majority view

has been that the definition of interception approved in *Goldman* v. *United States*, 316 U.S. at p. 134, leads to the conclusion that Section 605 does not prohibit the use of an extension telephone to overhear a conversation, and that lower court decisions to the contrary which were published prior to *Goldman* were discredited by it. See *Flanders* v. *United States*, *supra*, 222 F. 2d 163, 167 (C.A. 6), which considered all the authorities and then took the course urged by the government here, saying, "* * * [we] consider that the route we follow was pointed out by the Supreme Court in *Goldman v. United States*, *supra*"; *United States* v. *White*, *supra*, 228 F. 2d 832, 835 (C.A. 7), following *Flanders;* the decision below, 236 F. 2d 514, 518 (C.A. 10), saying "* * * we think the *Goldman* case controls * * * [and] that Rathbun's conversation was not intercepted * * * before it reached the ears of Sparks"; *United States* v. *Pierce*, *supra*, 124 F. Supp. 264, 269 (N.D. Ohio), saying, "In this case there was no interference with the means of communication. The conversations were heard by the officers 'at the moment' they came 'into the possession of the intended receiver'"; *United States* v. *Sullivan*, *supra*, 116 F. Supp. 480 (D. D.C.); *United States v. Guller*, *supra*, 101 F. Supp. 176 (E.D. Pa.)

The Second Circuit is the only one which has squarely held that a person who overhears another's conversation over an extension "intercepts" the communication within the meaning of Section 605.[10] In

[10] In *James* v. *United States*, 191 F. 2d 472, the Court of Appeals for the District of Columbia said, with reference to

United States v. *Polakoff*, *supra*, 112 F. 2d 888, 889 (C.A. 2), decided before *Goldman*, that circuit held "The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; * * *." This definition of "interception" is so broad as to render inadmissible the testimony permitted in *Goldman*, where the communicant did not consent to the "intervention as a listener" of the police officer. The Second Circuit modified its definition in *Reitmeister* v. *Reitmeister*, 162 F. 2d 691 (C.A. 2), where, in the course of its opinion in a civil suit, the court did reaffirm its position that listening on an extension with the consent of only one party was within the scope of Section 605, but on the ground that the use of an extension was the interjection of an independent listening device into the circuit."[11]

---

a wire recording in which the identity of the speaker was disputed, that the recording was inadmissible because one of the parties "did not consent to the interception of the conversation and the use of the recording as evidence." The decision cited *United States* v. *Polakoff*, 112 F. 2d 888 (C.A. 2), *supra*. It has not been uniformly followed within the District of Columbia Circuit. Cf. *United States* v. *Sullivan*, 116 F. Supp. 480, 483-484, and *United States* v. *Stephenson*, 121 F. Supp. 274.

[11] In *United States* v. *Hill*, 149 F. Supp. 83 (S.D. N.Y.), the court held that, where a third party shared the handset of one of the parties to the communication, there was a forbidden interception. The district judge no doubt felt bound by *Reitmeister* v. *Reitmeister*, *supra*. However, there is a fallacy in the judge's reasoning which is vital to the holding. He concludes that (p. 85), " * * * the basic purpose of § 605

Judge Chase disagreed on this point, saying (pp. 697-698):

> * * * I do not believe that our decision in United States v. Polakoff, 2 Cir., 112 F. 2d 888 has survived that of the Supreme Court in Goldman v. United States, 316 U.S. 129, * * *.
>
> * * * *
>
> The "overhearing" by the recording instrument in the appellee's office was no more the interception of a wire communication than the overhearing of the messages by a person at that place would have been. Because these messages ceased to be wire communications within the meaning of the statute as soon as they became audible at the receiving station called, the Communications Act did not thereafter apply to make their preservation an unlawful interception or their use an unlawful disclosure.

This statement by Judge Chase, which is in accord with the holding of the great majority of the courts which have ruled upon the issue, is a succinct statement of the government's position on this issue. The overhearing of a conversation on a telephone extension does not interfere with the means by which the message is transmitted from the sender to the receiver. It is therefore not an interception prohibited by Section 605.

---

to protect the privacy of telephone conversations and their means of transmission * * *" cannot be achieved if the shared handset situation is not prohibited. This is contrary to the *Goldman* ruling, which does not say that Section 605 protects the privacy of telephone communications, but that the section protects that privacy while the message is within the transmission conduit.

II

Regardless of Whether An Unauthorized Use of An Extension Telephone Is Deemed a Violation of Section 605 of the Communications Act, the Record Here Shows That Both Parties Consented.

Section 605 of the Communications Act does not prohibit the interception and divulgence of communications when "authorized by the sender." See *supra*, p. 3. As Judge Learned Hand pointed out in *United States* v. *Polakoff*, 112 F. 2d 888, 889 (C.A. 2), the term "sender" is not apt for the antiphonal exchange of conversation over a telephone system. It is suggested that the statute must be read as requiring consent by both parties to the conversation, each being in turn a "sender".[12] Even on this construction of the law, the evidence shows that both parties consented.

As to Mr. Sparks' end of the conversation in Colorado, there can be no dispute that the police officers were authorized by him to listen. He called them to his house and installed them in his dining room for that very purpose (R. 10-13). As to the petitioner, it cannot be asserted that he knew or approved of the action by the specific officers. However, the record shows his awareness that the conversation might be being recorded and his consent that it continue, for he stated "I am going to kill you, and I don't

---

[12] In this case, the call originated with the petitioner in New York, so that if one or the other must be selected as the "sender" it is logical that it should be the petitioner. Presumably it is on this basis that the petitioner assumes in his statement of the question presented that the petitioner was the "sender".

care if you're making a recording of this conversation." (R. 13.) Certainly this appears to be a general ratification of Sparks' action in having the conversation witnessed. Thus, passing over technical questions as to who was the "sender", there was in this case authorization by both parties to the conversation.

III

The Evidence Is Admissible In Any Event Because It Was Obtained By State Officers Enforcing State Law Without Participation By Federal Officers[13]

A. *The local police were acting in a local matter.*

Apart from the question of whether the evidence as to the overheard threats could be deemed an interception without consent, it was nevertheless properly admitted in this case because it was obtained by state officers enforcing state law without participation by federal officers.

Sparks had called local police to seek their help in the face of petitioner's threats. The tone of all of the telephone calls on March 16 was threatening and profane. Sparks manifestly thought petitioner was serious and he sought protection against vio-

---

[13] This issue is not included in the grant of certiorari as limited. However, the issue has since come before the Court in the *Benanti* case, No. 231 (see *supra*, p. 2), and, if we are correct in our argument in this Point III, the judgment below should be affirmed even if we are wrong on the question as to which certiorari was granted. Normally, the respondent can support the judgment below on any proper ground even if it was not the basis of the ruling of the lower court and even if it was not argued by the respondent below. *Langnes* v. *Green*, 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

lence, a local crime. The local police, in listening in, were trying to assess the danger of violence—a matter within their competence. This had to do with the enforcement of local law, not federal law. No federal officer participated in the surveillance or even had knowledge thereof at the time.

Subsequently, petitioner was arrested by federal agents on a federal warrant some twenty-four hours after the threat was uttered. That fact does not make the action of the local officers in listening to the conversations federal action.

Circuit court cases reveal that there must be a showing of collusion or actual participation between federal and local authorities before it may be said that federal agents had a hand in the search. Here, there is not only no showing of such participation, but no showing of knowledge by federal officers. *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *Jaroshuk* v. *United States*, 201 F. 2d 52 (C.A. 9); see also *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921; and *Sloane* v. *United States*, 47 F. 2d 889 (C.A. 10), where it was held that even where federal officers first informed state officials of their suspicions of crime, the action taken by state officers on the information could not be said to involve federal participation. There are cases which hold that, where state officers act solely to enforce federal law, their action must conform to Fourth Amendment standards for evidence obtained thereby to be admissible in federal courts. *Gambino* v. *United States*, 275 U.S. 310; *United States* v. *Butler*, 156 F. 2d 897 (C.A. 10). Those cases are

not applicable here since the police officials were intent upon upholding local, not federal, law. The evidence here was, in the terms of *Lustig* v. *United States*, 338 U.S. 74, 79, "turned over to the federal authorities on a silver platter".

B. *Evidence obtained by state officers enforcing state law without federal participation is admissible in a federal court even if illegally obtained.*

The question of whether evidence obtained by state officials enforcing state law in violation of Section 605 of the Federal Communications Act is admissible in federal courts is presently before this Court on a petition for a writ of certiorari in *Benanti* v. *United States*, No. 231, to review the judgment of the Court of Appeals for the Second Circuit, 244 F. 2d 389, upholding the admissibility of such evidence. As there recognized, the principles which have been established by this Court with relation to evidence obtained through an illegal search by state officers support the admissibility in federal courts of evidence obtained through wire tapping by state officers, so long as there was no federal participation in the interception.[14]

In *Weeks* v. *United States*, 232 U.S. 383, 398, the Court held that it was not error to permit the use

---

[14] The Second Circuit in its opinion in the *Benanti* case stated that the evidence was obtained in violation of Section 605 even though the local officers had obtained a warrant under state law authorizing wire tapping. The government has suggested that this may be an undue extension of Section 605 and that the statute need not be interpreted as prohibiting a state from legislating on the subject.

in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." And in *Byars* v. *United States*, 273 U.S. 28, 33, Justice Sutherland, for a unanimous Court, said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

This Court recognized in *Wolf* v. *Colorado*, 338 U.S. 25, that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits an unreasonable search or seizure by state officers; at the same time, the Court held that the state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. But this difference between the rule in the federal courts and that binding on the states is not based on the theory that the Fourth Amendment is more important than the Fourteenth, or that state officers may violate the law where federal officers may not. The purpose of the federal rule is to discourage unlawful conduct, and the only persons as to whom such a rule in the federal courts is effective are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy recognized by the Fourth Amendment. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. Such a ruling would impede federal prosecu-

tion without furthering the judicial policy of discouraging future arbitrary intrusions on individual privacy.

It is for this reason that the exclusionary rule applies only where there has been participation in the illegal or unconstitutional conduct by federal officers. *Lustig* v. *United States*, 338 U.S. 74; *Irvine* v. *California*, 347 U.S. 128, 136; *Feldman* v. *United States*, 322 U.S. 487, 492; *Burdeau* v. *McDowell*, 256 U.S. 465. As stated in Justice Frankfurter's opinion in *Lustig* v. *United States*, *supra*, 338 U.S. 74, 78-79, a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, we have already pointed out that the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone* v. *United States*, *supra*, 308 U.S. 338, 340-341; *Goldstein* v. *United States*, *supra*, 316 U.S. 114, 120-121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz* v. *Texas*, 344 U.S. 199.[15] Similarly, just as the

---

[15] It is at least doubtful that the action by the police officers was illegal under Colorado law. Chapter 40, Article

Fourth Amendment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Since the evidence may be used in state proceedings, state officers will not be deterred from engaging in wiretapping by an exclusionary rule as to federal prosecutions when their purpose is solely to enforce local laws. Hence wiretap evidence obtained by state officers without federal participation should be admitted in federal courts since the object of exclusion as to federal officers does not apply.

4, § 17 of the Colorado Revised Statutes (1953) provides: "Any person who * * * cuts, breaks, taps or makes any connection with any telegraph or telephone line, wire, cable or instrument belonging to another, and wilfully reads, takes or copies any message, communication or report intended for another passing over any such telegraph or telephone line, wire or cable * * * shall be deemed guilty of a misdemeanor * * *." This requires a physical tampering with the line which was not here present. Nor does it appear that, even if the action of the officers had been illegal under state law, their evidence would have been excluded in a proceeding in a state court. *Wolf* v. *Colorado*, 338 U.S. 25.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

SEPTEMBER, 1957

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 438975 377

NO. 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FLOYD LINN RATHBUN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

THOMAS K. HUDSON,
335 Petroleum Club Building,
Denver 2, Colorado,
MAin 3-2237,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 30

FLOYD LINN RATHBUN,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the United States.

The petitioner, Floyd Linn Rathbun, respectfully requests a rehearing in the above entitled cause and that the decision be modified as hereinafter suggested for the reasons and upon the grounds following, to-wit:

(1) That the statute here involved, to-wit: Sec. 605, of the Federal Communications Act of June 13, 1934, 48 Stat. 1064, 1104, 47 U. S. C. Sec. 605, is a penal statute and must be strictly construed. The decision as herein rendered does not embrace a strict construction of that statute but on the contrary superimposes upon it exceptions and conditions.

(2) The decision of this Honorable Court in holding that the consent of one party to the listening in is sufficient to remove the divulgence of that conversation from the provisions of the statute is to repeal that statute by judicial fiat.

(3) That counsel for the petitioner, Floyd Linn Rathbun, did not have an opportunity, due to the shortness of

time and the interruptions of the oral argument by questioning on the part of Justices of this Court—which was most welcome—to present to the Court the arguments and notes of the Congressional hearings and meetings at the time of the passing of Section 605.

(4) That the decision of this Court in construing Sec. 605 to except from its application a listening in over a regularly used extension telephone is legislation by the Judiciary and prohibited by the Constitution of the United States.

Therefore, petitioner respectfully submits that a rehearing should be had and the decision revised as to both fact and law, believing that a re-examination of the record made by the Court after rehearing, wherein counsel may be able to assist the Court better to examine and understand the record certified, will result in the revision and reversal of the decision herein, and that a miscarriage of justice will occur if this case is not reversed.

THOMAS K. HUDSON,
Attorney for Petitioner.

CERTIFICATE

STATE OF COLORADO, CITY AND COUNTY OF DENVER, SS.

THOMAS K. HUDSON, being first duly sworn upon his oath, deposes and says: That he is attorney of record for the petitioner, Floyd Linn Rathbun; that the Petition for Rehearing is filed in good faith and not for the purpose of delay.

Further affiant saith not.

THOMAS K. HUDSON.

Subscribed and sworn to before me this 30th day of December, A. D. 1957.

[Seal]

ALICE LOVELAND,
Notary Public.

My Commission expires
March 20, 1961.